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# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 447

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WHEELING STEEL CORPORATION, APPELLANT,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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FILED DECEMBER 6, 1948.

# SUPREME COURT OF THE UNITED STATES

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WHEELING STEEL CORPORATION, APPELLANT,

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C. EMORY GLANDER, TAX COMMISSIONER OF  
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[fol. 3] **IN SUPREME COURT OF OHIO**

No. 31079

**WHEELING STEEL CORPORATION, Appellant,**

**vs.**

**C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee**

**PETITION FOR ALLOWANCE OF AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed November 2, 1948**

**To the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio:**

Your petitioner, Wheeling Steel Corporation, a Delaware corporation, respectfully represents that it is the appellant in the above captioned cause and that on August 4, 1948, the Supreme Court of Ohio, the highest court in said state in which a decision in said cause could be had, rendered a certain judgment therein, against appellant and in favor of appellee, the Tax Commissioner of Ohio, affirming that certain decision of the Board of Tax Appeals of Ohio rendered on April 7, 1947 and numbered 9681 on the docket of said Board, in which said Board of Tax Appeals affirmed a property tax assessment made by appellee against certain intangible property belonging to appellant.

On August 17, 1948, appellant filed with the Supreme Court of Ohio its Application for Rehearing, which was denied by said Court on October 6, 1948. Said judgment of said Court became operative and final on October 6, 1948.

[fol. 4] In said cause there is drawn in question the validity of Sections 5328-1 and 5328-2 of the General Code of Ohio, on the ground of their being repugnant to the Constitution of the United States in this, that as construed and applied said statutes burden and obstruct interstate commerce and deprive appellant of its property without due process of law and deny appellant the equal protection of the laws of Ohio, and the judgment of the Supreme Court of Ohio is in favor of the validity of said statutes and against the constitutional rights, privileges and exemptions specifically claimed by appellant.

Wherefore, appellant prays for the allowance of an appeal from the Supreme Court of Ohio to the Supreme Court of the United States in order that said decision of the Supreme Court of Ohio may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Ohio may be sent to the Supreme Court of the United States, as provided by law.

Dated at Columbus, Ohio, this 1st day of November, 1948.

Wheeling Steel Corporation, by Dargusch, Caren, Greek & King; Carlton Dargusch, John Caren, Its Attorneys.

[fol. 5] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Nov. 2, 1948

Appellant, Wheeling Steel Corporation, respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of Ohio in the above captioned cause there is manifest error in this, to wit:

1. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with Article I, Section 8 of the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they subject to taxation in Ohio receipts from interstate activities carried on outside of Ohio, thus subjecting the property to the risk of a double tax burden to which intrastate commerce is not exposed and thereby burdening and obstructing interstate commerce.

2. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they require the assessment [fols. 6-50] of a property tax against intangible property which was not within the jurisdiction of the state of Ohio, thereby depriving appellant of its property without due process of law.



3. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they require the imposition of a property tax against the intangible property of appellant, a non-resident, but exempt identical property of a resident from taxation in Ohio, thereby denying appellant equal protection of the laws of Ohio.

For which errors said Wheeling Steel Corporation prays that said final judgment of the Supreme Court of Ohio be reversed and a judgment rendered in favor of said Wheeling Steel Corporation; and for costs.

Dated at Columbus, Ohio this 1st day of November, 1948.

Dargusch, Caren, Greek & King; Carlton Dargusch;  
John Caren, Attorneys for Appellant, Wheeling  
Steel Corporation.

[fols. 51-58] Citation in usual form filed Nov. 4, 1948, omitted in printing.

[fol. 59] (File endorsement omitted).

[fol. 60] IN SUPREME COURT OF OHIO

No. 31079

WHEELING STEEL CORPORATION, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

ORDER ALLOWING APPEAL—Filed Nov. 2, 1948

The appellant in the above entitled case having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled case by the Supreme Court of Ohio on the 6th day of October, 1948, upon the opinion and decision of said Supreme Court of Ohio of August 4, 1948, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors,

Prayer for Reversal and Statement as to Jurisdiction pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided:

It is ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme [fols. 61-66] Court of the United States so that he shall have the same in said Court within forty days of the date hereof.

And it is further ordered that security for costs on appeal be fixed at the sum of \$500.00, and that upon approval of bond in said amount this order shall operate as a super-seedeas.

Dated at Columbus, Ohio, this 1. day of November, 1948.

(S.) Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol: 67] (File endorsement omitted).

[fol. 68] IN SUPREME COURT OF OHIO

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed Nov. 3, 1948

To the Clerk of the Supreme Court of Ohio:

You are hereby requested to make a transcript of the record in the above entitled case, the same to be filed in the Supreme Court of the United States pursuant to the appeal allowed therein on November 1, 1948, by the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, and, without limiting the generality of the foregoing request, to include in said transcript the following:

1. The transcript of the record of the proceedings before the Tax Commissioner of Ohio in the matter of the application of Wheeling Steel Corporation for review and redetermination for the year 1942, the same being numbered 544 on the docket of said Commissioner;

2. The transcript of the record of the proceedings before the Board of Tax Appeals of Ohio in the appeal to said Board from the Tax Commissioner of Ohio in the case of [fols. 69-70] Wheeling Steel Corporation vs. C. Emory Glander, Tax Commissioner of Ohio, the same being numbered 9861 on the docket of said Board.

Said transcript is to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States and is to be filed with the Clerk of the Supreme Court of the United States on or before the 11th day of December, 1948.

Dated at Columbus, Ohio, this 3rd day of November, 1948.

Dargusch, Caren, Greek and King; Carlton S. Dargusch; John Caren.

[fols. 71-73] Bond on appeal for \$500.00, approved and filed Nov. 3, 1948, omitted in printing.

[fol. 74] IN SUPREME COURT OF OHIO, JANUARY TERM, 1947

31079

Title of Case: WHEELING STEEL CORPORATION, Appellant,  
v. C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

Action: Appeal from the Board of Tax Appeals.

Attorneys: Dargusch, Caren, Greek & King, John Caren,  
44 E. Broad St., Columbus 15, Ohio. Hugh S. Jenkins,  
Daronne R. Tate, Columbus, Ohio.

MEMORANDA OF PLEADINGS, &C FILED, WRITS ISSUED, &C.

May 2, 1947. Notice of appeal & proof of service filed.

May 15, 1947. Transcript of Record & Abstract of Docket of Board of Tax Appeals filed.

May 15, 1947. Cause docketed.

May 19, 1947. Papers taken by Rodenfels. 6/19/47 returned.

June 4, 1947. Application of Squire, Sanders & Dempsey for leave to file brief Amicus Curiae herein filed.

June 4, 1947. Entry granting Squire, Sanders & Dempsey



leave to file brief Amicus Curiae herein on or before June 25, 1947. Carl V. Weygandt, C.J. J. 38, Page 401.

June 12, 1947. Entry extending time for filing printed record herein to July 14, 1947. E. S. Matthias, J. J. 38, Page 410.

June 19, 1947. Printed record & proof of service filed.

June 26, 1947. Printed brief Amicus Curiae of Squire, Sanders & Dempsey, (same as 31037-31081) filed. 7/5/47 P. S. filed.

[fol. 75] July 10, 1947. Entry extending time for appellant's printed brief to Aug. 20, 1947. E. S. Matthias, J. J. 38, Page 428.

July 22, 1947. Receipted bill for printing of record filed.

Aug. 13, 1947. Entry extending time for filing appellant's printed brief to Sept. 8, 1947. E. S. Matthias, J. J. 38, Page 449.

Sept. 4, 1947. Appellant's printed brief filed. 9/11/47 P. S. filed.

Oct. 3, 1947. Appellee's printed brief & A of S filed. 10/6/47 P. S. filed.

Aug. 4, 1948. Decision affirmed. J. 38, Page 685.

Aug. 10, 1948. Notified application for rehearing to be filed.

Aug. 17, 1948. Application for rehearing filed.

Oct. 6, 1948. Rehearing denied. J. 39, Page 2.

Nov. 2, 1948. Petition for appeal filed.

Nov. 2, 1948. Assignment of errors filed.

Nov. 2, 1948. Jurisdictional statement filed.

Nov. 2, 1948. Order allowing appeal filed.

Nov. 2, 1948. Citation issued.

Nov. 2, 1948. Certificate as to Federal Questions considered and decided filed.

Nov. 3, 1948. Notice to appellee as required by rule 12; paragraph 3 of U. S. Supreme Court filed.

Nov. 3, 1948. Proof of service of all papers filed.

Nov. 3, 1948. Precipe for transcript of record filed.

Nov. 3, 1948. Bond, in sum of \$500.00, National Surety Corporation as surety, approved and filed.

Nov. 4, 1948. Citation returned and filed.

[fol. 76]

#### JOURNAL ENTRIES

31079. Wednesday, June 4, 1947. Entry. Upon application and for good cause shown, it is ordered that Squire,

Sanders & Dempsey are hereby given leave to file brief Amicus Curiae herein on behalf of appellant on or before June 25, 1947. Carl V. Weygandt, Chief Justice. J. 38, Page 401.

31079. Thursday, June 12, 1947. Entry. Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record herein be, and the same hereby is, extended to July 14, 1947. Edward S. Matthias, Judge J. 38, Page 410.

31079. Thursday, July 10, 1947. Entry. Upon application of appellant, and for good cause shown, it is ordered that the time for filing appellant's brief herein be, and the same hereby is, extended to August 20, 1947. Edward S. Matthias, Judge J. 38, Page 428.

31079. Wednesday, August 13, 1947. Entry. Upon application of appellant and for good cause shown, it is ordered that the time for filing appellant's printed brief herein be, and the same hereby is, extended to September 8, 1947. Edward S. Matthias, Judge J. 38, Page 449.

#### JUDGMENT

31079. Wednesday, August 4, 1948. Appeal from the [fol. 77] Board of Tax Appeals. This cause came on to be heard upon the transcript of the record of the Board of Tax Appeals of Ohio and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed for the reasons stated in the opinion rendered herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals of Ohio, to carry this judgment into Execution. J. 38, Page 685.

#### ORDER DENYING REHEARING

31079. Wednesday, October 6, 1948. Rehearing Docket. Upon consideration of the application for rehearing herein, it is ordered by the Court that rehearing be, and the same hereby is, denied. J. 39, Page 2.

[fol. 78]- [File endorsement omitted]

IN THE SUPREME COURT OF OHIO

[Title omitted]

NOTICE OF APPEAL—Filed May 2, 1947

Wheeling Steel Corporation, a Delaware corporation, hereby gives notice of appeal to the Supreme Court of Ohio from a decision of the Board of Tax Appeals dated May 7, 1947, of which the following is a true and correct copy, viz:

“BEFORE THE BOARD OF TAX APPEALS DEPARTMENT OF  
TAXATION OF OHIO

No. 9681

ENTRY

April 7, 1947.

WHEELING STEEL CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio,  
Appellee

This cause came on for hearing upon an appeal from the final order of the tax commissioner denying an application for review and redetermination with respect to an assessment made by him against the appellant on its taxable credits consisting of notes or accounts receivable and prepaid items, which assessment amounted to \$6,280.35. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, the stipulation of facts and briefs of counsel.

From the stipulation of facts it appears that appellant is a Delaware corporation, in which state it [fol. 79] maintained a statutory office. Its principal office and place of business were located in Wheeling, West Virginia, where all the officers had their offices, where all meetings of shareholders, directors and the executive committee were held and where all dividends were declared. All of appellant's general books and ac-



counting records were kept at the Wheeling office. All credit was granted and collections of accounts and notes receivable, etc. were made there. Appellant operated four manufacturing plants in West Virginia and four in Ohio. It maintained sales offices in twelve states, one of which offices was located in Cincinnati, Ohio.

The stipulation also contains the following:

'Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax-listing day in 1942 resulted either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. \* \* \*

'All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. The sales offices had no powers or duties with respect to the creation, custody, collection or extinguishment of said notes.

'All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avails of said accounts receivable were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of

said accounts receivable were kept at the sales offices which had no powers or duties with respect to the collection thereof.

[fol. 80] 'All of said notes and accounts receivable arose in the ordinary course of appellant's business of making sales of its products.

'Payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants. Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose. All commercial and other accounts payable were paid by checks signed at and issued at the Wheeling office.

'All policies of insurance against loss or liability purchased by appellant were negotiated at the Wheeling office where they were delivered, paid for and kept. Such policies were blanket policies covering properties and potential risks in West Virginia, Ohio and other states.

'All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942.'

In its consolidated inter-county return appellant allocated all of its accounts receivable and prepaid items outside of Ohio. The tax commissioner, on the other hand, determined that certain of the credits owned by appellant and its subsidiaries had their situs in Ohio and that the amount thereof which was, therefore, taxable in this State was \$2,093,450, making an assessment thereon of \$6,280.35, which is the subject of this appeal. The amount of such credits was arrived at as follows:

'In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of \$5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and accounts receivable resulted from the sale of products shipped from appellant's Ohio manufacturing plants; that \$225,328 in prepaid insurance

had arisen out of business transacted in Ohio inasmuch as it represented prepaid premiums for insurance on appellant's Ohio manufacturing plants. The total of the credits so determined to have arisen out of business transacted by appellant in Ohio was \$5,475,853 and was 47.623% of all of appellant's and its subsidiaries' notes, accounts receivable and prepaid items which amounted to \$11,498,424 on tax-listing day in 1942. Appellee then computed said assessment by deducting, \$7,102,540, the total of appellant's and its subsidiaries' accounts payable, from \$11,498,424, the total of notes and accounts receivable and prepaid items, and assessing 47.623% of the remainder, to-wit, \$2,093,450, as credits taxable in Ohio.'

One question presented is whether the tax commissioner erred in allocating to Ohio the accounts receivable which arose from sales of goods which were shipped from its plants in this State. In determining this question the Board is bound to follow the statutes applicable thereto, as construed by the Supreme Court. Section 5328-1, General Code, provides in part as follows:

'Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation;'

It is clear that under this statute intangibles owned by a non-resident cannot be taxed unless they are both used in business in this State and arise out of business transacted here. Section 5325-1, General Code, reads in part as follows:

'Moneys, deposits, investments, accounts receivable and prepaid items and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended



to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.'

Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. *Ransom & Randolph Co. v. Evatt*, 142 O.S. 398, 27 O.O. 348, 37 O.L.A. 481, 10 O. Supp. 25, 52 N.E. (2d) 738; *Haverfield Company v. Evatt*, 143 O.S. 58, 28 O.O. 16, 54 N.E. (2d) 149.

We come now to Section 5328-2, General Code, which provides, with reference to the situs of accounts receivable, as follows:

[fol. 82]. 'Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

'In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state. \* \* \*

Said section also provides that:

'The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this

state to property of a person residing outside of this state in a like case and under similar circumstances.'

This reciprocal provision indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this Board has no right to declare a statute unconstitutional. *Hillsborough Township v. Cromwell*, 90 L. ed. 298; *Schwartz v. Essex County Board of Taxation* 129 N.J.L. 129, affirmed 130 N.J.L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court. In the case of *National Cash Register Company v. Evatt*, 145 O.S. 597, 31 O.O. 218, 42 O.L.A. 545, 15 O. Supp. 144, 62 N.E. (2d) 327, the [fol. 83] Court held that accounts receivable of the company, a Maryland corporation, which arose from sales made outside of Ohio of goods filled by shipment from its manufacturing plant in Ohio, were taxable in this State. The Court said:

'We direct our attention first to the question whether the accounts receivable, arising from sales outside Ohio and filled from a stock of goods in Ohio, have an Ohio situs for purpose of taxation.'

In referring to section 5328-2, General Code, the Court said:

'Applying that section to the facts in the instant case, it means that accounts receivable belonging to a Maryland corporation, when resulting from sales of property by an agent having an office in Ohio or from a stock of goods maintained in Ohio, shall be considered to arise out of business transacted in Ohio.'

It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The Board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of National Distillers Products Corporation v. Glander, No. 11118, decided by this Board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the Board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

For the foregoing reasons the Board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this State and, consequently, are taxable here.

No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this State. [fol. 84] As to this, section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The Board finds that these prepaid items relate to property used in appellant's business in this State and, in view of the above statu-



tory provisions, arose out of business transacted in this State and are, therefore, taxable.

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

(S.) Edward J. Kirwin, Secretary." (Seal.)

The decision is erroneous in the following respects:

1. It affirms the action of appellee in assessing an ad valorem tax in respect of intangible property of appellant, a foreign corporation not having a commercial domicile in Ohio, notwithstanding that the property, consisting of accounts receivable and prepaid items, was never in Ohio and did not have a business situs in Ohio. The assessment, therefore, is invalid and collection of the tax assessed would (a) burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and (b) deprive appellant of its property without due process of law and deny appellant the equal protection of the laws, [fol. 85] contrary to the 14th Amendment to the Constitution of the United States.

2. It construes Section 5328-1 and 5328-2 of the General Code of Ohio, as applied to the stipulated facts of this case, to require the assessment of appellant's aforesaid property for taxation in Ohio. As so construed and applied, said statutes are unconstitutional because (a) they burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and (b) deprive appellant of its property without due process of law and deny appellant the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States.

3. The intangible property of appellant is not taxable in Ohio under Ohio law, because it did not have a business

situs in Ohio and did not arise out of and was not used in business in this state.

4. There is no evidence in the record to support the Board of Tax 'Appeals' decision that appellant's accounts receivable resulted from sales of property from a stock of goods maintained in Ohio.

Wheeling Steel Corporation, by (S.) Dargusch,  
Caren, Greek & King, Its Attorneys.

[fol. 86]

IN SUPREME COURT OF OHIO

National Distillers Products Corp., Appellant, v. Glander,  
Tax Commr., Appellee.

National Distillers Products Corp., Appellant, v. Evatt,  
Tax Commr., Appellee.

Wheeling Steel Corp., Appellant, v. Glander, Tax Commr.,  
Appellee.

United States Gypsum Co., Appellant, v. Evatt, Tax  
Commr., Appellee. (Two Cases.)

Taxation—Corporation franchise and intangible personal  
property—Foreign corporation maintained Ohio plants  
which completed orders sold—General books kept and  
orders accepted at principal office outside Ohio—Accounts  
receivable or avails thereof used in business generally—  
Prepaid insurance premiums on property located in Ohio  
—Sections 5325-1, 5328-1 and 5328-2, General Code.

(Nos. 31037, 31038, 31079, 31080, and 31081—Decided  
August 4, 1948.)

### Appeals from the Board of Tax Appeals

Five cases are here involved.

Each appellant is a foreign corporation which operates at least one manufacturing plant in the state of Ohio. Of the five appeals two have been perfected by the National Distillers Products Corporation, a Virginia Corporation, one by the Wheeling Steel Corporation, a Delaware corporation, and two by the United States Gypsum Company, an Illinois corporation.

[fol. 87]. In each case the Tax Commissioner of Ohio made an additional assessment of either intangible personal property tax or corporation franchise tax.

In each instance the order was appealed to the Board of Tax Appeals and was affirmed.

The cases are in this court for review on the contention of the appellant corporations that the decisions of the Board of Tax Appeals are unreasonable and unlawful.

### OPINION *Per Curiam*

Mr. Isadore Topper; for appellant National Distillers Products Corporation.

Messrs. Dargusch, Caren, Greek & King, for appellant Wheeling Steel Corporation.

Messrs. Scott, MacLeish & Falk, Mr. Clarence D. Laylin, Mr. Charles M. Price, Mr. Clifford C. Pratt and Mr. Joseph A. Dubbs, for appellant United States Gypsum Company.

Mr. Hugh S. Jenkins, attorney general, and Mr. Daronne R. Tate, for appellee.

By the Court. These cases were presented together for the reason that all five of them involve similar questions of situs under the provision of Sections 5328-1 and 5328-2, General Code.

These and cognate provisions have been discussed and applied in many recent decisions by this court. *Aluminum Co. of America v. Evatt, Tax Commr.*, 140 Ohio St., 385, 45 N. E. (2d), 118; *Procter & Gamble Co. v. Evatt, Tax Commr.*, 142 Ohio St., 369, 52 N. E. (2d) 517; *Ransom & Randolph Co. v. Evatt, Tax Commr.*, 142 Ohio St., 398, 52 N. E. (2d), 738; *Haverfield Co. v. Evatt, Tax Commr.*, 143 [fol. 88] Ohio St., 58, 54 N. E. (2d), 149; *C. F. Kettering, Inc., v. Evatt, Tax Commr.*, 144 Ohio St., 419, 59 N. E. (2d), 370; *National Cash Register Co. v. Evatt, Tax Commr.*, 145 Ohio St., 597, 62 N. E. (2d), 327; *American Rolling Mill Co. v. Evatt, Tax Commr.*, 147 Ohio St., 207, 70 N. E. (2d), 651.

Section 5325-1, General Code, reads as follows:

“Within the meaning of the term ‘used in business,’ occurring in this title, personal property shall be considered to be ‘used’ when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchan-



dise or agricultural products belonging to a nonresident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code, reads in part as follows:

"\* \* \* Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code \* \* \* shall be subject to taxation \* \* \*"

[fol. 89] Section 5328-2, General Code, contains the following provisions:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state. \* \* \*

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this

state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a nonresident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The facts relating to two of the companies here involved are not in dispute and are supplied by stipulations. The two concerning the National Distillers Products Corporation are ten and nine pages respectively in length and need [fol. 90] not be quoted in full for the purposes of this discussion. As above indicated, this company is a Virginia corporation. Its shareholders' meetings are held in that state. Its principal business office is located in the city of New York where the meetings of its directors are held and where all its business activities are controlled. All its accounts payable are paid from funds on deposit there. It has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton county, Ohio. It sells its products in every state where such products may be sold legally. Pay-roll checks for employees of these several plants and checks for federal excise taxes due from these plants are paid with funds on deposit in banks in those localities. The funds are obtained through checks drawn at the New York office on banks in that city. All accounts receivable are posted in the books of the company in the New York office where the accounts are payable. All the receipts are deposited in New York banks. The accounts receivable, the allocation of which resulted in the additional assessments of intangible property tax and corporation franchise tax, arose from the sale of products manufactured by the company at its Carthage plant. The products were shipped from a stock of goods maintained by the company at that plant to points in Ohio and other states. All orders for the sale of these products were solicited by agents outside of Ohio. The orders were forwarded to New York [fol. 91] and were subject to acceptance or rejection at the

New York office. When orders were accepted, shipping instructions were forwarded to the Ohio plant from which the products were then shipped to the designated points in Ohio and elsewhere. The moneys received from the accounts receivable were used by the company in its business generally wherever needed. In filing its annual report and tax return the company allocated none of its accounts receivable to Ohio.

In its opinion the Board of Tax Appeals correctly summarized the matters as follows:

“The appellant, as a corporation organized and existing under the laws of the state of Virginia, is a legal resident of that state; and as to the appellant corporation the state of Ohio is ‘a state other than that in which the owner thereof resides’ and such other state within the provisions of Section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this board hereby finds—in the conduct of its business in the state of Ohio by the sale of its products from a stock of goods located in this state, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this state or elsewhere, such accounts receivable have a business and taxable situs in the state of Ohio, as found and determined by the Tax Commissioner.”

The company contends further that this interpretation of Section 5328-2, General Code, renders these provisions violative of the due-process and equal-protection clauses of [fol. 92] the state and federal constitutions. However, this question was squarely and properly decided in the recent case of *Parke, Davis & Co. v. City of Atlanta*, 200 Ga., 296, 36 S. E. (2d); 773, 163 A. L. R., 976, in which the first and fourth paragraphs of the syllabus read as follows:

“1. Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the state,



which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the city of Atlanta, and would have a taxable situs for *ad valorem* taxation by said municipality, notwithstanding that the orders taken by the nonresident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the city of Atlanta and the state of Georgia. \* \* \*

“4. Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment to the Constitution of the United States, or paragraphs 2 and 3 of Section 1 in Article I of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the state.”

The facts concerning the Wheeling Steel Corporation are embodied likewise in a stipulation. As already stated, it is a Delaware corporation and maintains an office in that state. However, Wheeling, West Virginia, is the location [fol. 93] of its principal office and place of business where all meetings of the shareholders, directors and executive committee are held. Its general books and accounting records are kept there. All credit is determined there; and the collections of notes and accounts receivable are made there. Four manufacturing plants are operated in West Virginia and four in Ohio. Sales offices are maintained in twelve states—one in Ohio. When notes and accounts receivable are paid, the avails thereof are applied indiscriminately to the general purposes of the company's business, whether in Ohio or elsewhere. Pay rolls are prepared and pay-roll checks are prepared, signed and distributed at each plant. Bank balances sufficient for this purpose are maintained in each such community.

In its opinion the Board of Tax Appeals said in part:

"It is clear that under this statute (Section 5328-1, General Code) intangibles owned by a nonresident cannot be taxed unless they are both used in business in this state and arise out of business transacted here.  
\* \* \*

"Since the avails of these accounts *re-receivable* were applied to the conduct of appellant's business generally, both in this state and elsewhere, they must be held to be used in business within the meaning of this statute (Section 5325-1, General Code). \* \* \*

"It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained [fol. 94] in Ohio since it is its claim that none of its accounts receivable is taxable here. The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118, decided by this board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state, and consequently are taxable here.

"No argument is made in any of the briefs with reference to the prepaid items, which consisted of pre-

paid insurance premiums on property located in this state. As to this, Section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The board finds that these prepaid items relate to property used in appellant's business in this state and, in view of the above statutory provisions arose out of business transacted in this state and are, therefore, taxable."

[fol. 95] The facts concerning the United States Gypsum Company are presented by a stipulation of facts and the testimony of two witnesses.

This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All payroll checks are prepared and signed there and are drawn on funds there and in Ohio. Sales are managed and directed through divisional and district sales offices. Two district offices are located in Ohio. Orders taken by salesmen are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States; and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere.

[fol. 96] In its opinion the Board of Tax Appeals reached the following conclusion:



“The evidence shows that certain manufacturing or processing of the raw products, which were kept on hand at its Ohio plants in sufficient quantities to fill any orders that may be received, was necessary to convert them into the completed products ordered. This process took anywhere from approximately four minutes to less than one hour. The board is of the opinion that it makes no difference whether the products were put into their completed form before or after the orders therefor were accepted and received. The evidence shows that the appellant did maintain in Ohio a stock of goods which was necessary to make the completed products sold by it. The same questions arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118 decided by this board on March 12, 1947, and the case of *Wheeling Steel Corporation v. Glander*, No. 9681 decided by this board April 7, 1947. Reference is hereby made to the entries in those cases and also to the case of *National Distillers Products Corporation v. Glander*, No. 9095 with reference to a franchise tax assessment decided on March 12, 1947.

“For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio.”

The company insists that there is a total lack of integration of the accounts receivable with that part of the company's total business which is conducted in Ohio. This court finds that it cannot agree with this contention. In this and the other cases the decisions of the Board of Tax Appeals must be affirmed.

*Decisions affirmed.*

Weygandt, C. J.; Turner, Matthias, Hart, Zimmerman, Sohngen and Stewart, JJ., concur.

[fol. 97] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 98] [File endorsement omitted]

IN SUPREME COURT OF OHIO

[Title omitted]

CERTIFICATE AS TO FEDERAL QUESTION INVOLVED—Filed  
November 2, 1948

On motion of appellant, Wheeling Steel Corporation, the Court orders it to be certified and made a part of the record of the proceedings and of the judgment of affirmance in this cause that in its Notice of Appeal to this Court from the Board of Tax Appeals, appellant drew in question the validity of Sections 5328-1 and 5328-2 of the General Code of Ohio upon the ground that, as construed and applied by the Tax Commissioner and the Board of Tax Appeals of Ohio, said statutes are unconstitutional in this, that they burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and deprive appellant of its property without due process of law, and deny appellant equal protection of the laws of the state of Ohio, contrary to the Fourteenth Amendment to the Constitution of the United States; and that the question of the validity of said statutes, as specified in said notice of appeal, was urged upon the Court in the briefs and arguments of counsel for [fol. 99] appellant; that a determination of the question was necessary to the decision of this case; and further, that upon consideration of the same, the Court was of the opinion, and so decided, that said statutes are valid and are not repugnant to the Constitution of the United States.

Witness the Honorable the Supreme Court of Ohio this 1 day of November, 1948.

Supreme Court of Ohio, Carl V. Weygandt, Chief  
Justice of the Supreme Court of Ohio.

[fol. 100]

[File endorsement omitted]

## IN SUPREME COURT OF OHIO

[Title omitted]

## APPLICATION FOR REHEARING—Filed August 17, 1948

On August 4, 1948 this court decided this cause by affirming the decision of the Board of Tax Appeals. The result of the decision is to assign an Ohio situs to certain intangible property of this appellant, Wheeling Steel Corporation, a foreign corporation, said intangible property consisting of certain prepaid insurance premiums on Ohio plants of this appellant and certain notes and accounts receivable due this appellant and to levy upon such prepaid items and such notes and accounts receivable as credits \* an ad valorem tax.

[fol. 101] Wheeling Steel Corporation, the appellant herein, hereby respectfully applies for rehearing in this cause for the reasons hereinafter stated:

## I

The opinion was per curiam and consists almost entirely of quotations from the opinion of the Board of Tax Appeals. Under Sections 5325-1, 5328-1 and 5328-2 of the General Code such prepaid insurance premiums and such notes and accounts receivable of this appellant, to have a taxable situs in Ohio, *must be used in business and must arise out of business in Ohio.*

(a) Under the applicable provisions of Section 5328-2 of the General Code prepaid insurance premiums (prepaid items) are said to arise out of business "when the right

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\* Section 5327 of the General Code defines "credits" as follows: "The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items (used) in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. 'Current accounts' includes items receivable or payable on demand or within one year from the date of inception, however, evidenced."



acquired thereby relates *exclusively* to the business transacted in such other state or to property used in such business." It is stipulated (see Stipulation of Facts, Sec. 17, page 14, Appellant's Brief) that the insurance policies, upon which the premiums were prepaid, were blanket policies covering properties and potential risks in West Virginia, Ohio and other states. It necessarily follows, therefore, that being blanket policies covering properties in several states, the right acquired thereby did not relate *exclusively* to business to be transacted in Ohio or to property used in such business and, therefore, these items did not arise out of business transacted in this state. Neither were they used in business in Ohio because they were not being [Vol. 102] applied in the conduct of business in Ohio.

(b) Under the applicable provision of Section 5328-2 of the General Code, notes and accounts receivable are said to arise out of business in Ohio if such intangibles result from sales "from a stock of goods maintained" in Ohio. The Board of Tax Appeals (see page 236 of the opinion of this court) said:

"The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant maintained in Ohio a stock of goods which was necessary to make the completed products."

This statement, which this court adopted, is erroneous and at variance with the facts of record (see Stipulation of Facts, Sec. 11, page 12 of Appellant's Brief) wherein it is stated:

"Products shipped from appellant's Ohio manufacturing plants to fill the orders from which resulted the greater part, in dollar value, of the notes and accounts receivable owned by appellant and its subsidiaries on tax-listing day in 1942 were manufactured at said plants after receipt of, and to fill specific orders therefor and had not been manufactured prior to the receipt of orders and kept on hand to fill orders. A smaller part, in dollar value, of said notes and accounts receivable resulted from sales of products which had been manufactured prior to the receipt of orders therefor and kept on hand at said plants to fill any orders therefor that appellant might receive."

It is therefore apparent that with respect to a majority of such notes and accounts receivable there was no stock of goods from which orders were filled and that goods were in fact manufactured to fill specific orders and the majority of the orders were therefore not filled from a stock of goods [fol. 103] as stated by the Board of Tax Appeals. Furthermore, there is no showing that such notes and accounts receivable were used in business within the meaning of Section 5328-1 of the General Code.

(c) This court has failed to distinguish between ad valorem taxes such as those levied by Section 5328-1 and 5328-2 of the General Code on such notes and accounts receivable and franchise or excise taxes and income taxes measured by business done. The state of Ohio has no jurisdiction to tax the credits resulting from such notes and accounts receivable of appellant merely because such notes and accounts receivable arise from the sale of tangible personal property manufactured within the state of Ohio. We may concede for the purpose of argument that the following items are illustrative of the type of property currently taxed in Ohio and properly within the territorial jurisdiction of the state of Ohio for tax purposes so far as Wheeling Steel Corporation is concerned:

1. The land and buildings of the corporation located within Ohio;
2. The machinery and equipment located therein;
3. The inventories of raw materials, semi-finished and finished products in Ohio;
4. Cash on hand in offices of the corporation located within Ohio;
5. Deposits in Ohio banks (other than general reserves) withdrawable in the course of the corporation's business by an officer or agent having an office within Ohio.

[fol. 104] It is perfectly appropriate also for the General Assembly, as it has done, to levy a franchise tax upon the capital stock of the corporation for the privilege of doing business in Ohio, allocating to Ohio that proportion of the total value of the capital stock as is represented by business done in Ohio and property in Ohio to all business and property, but by no stretch of the imagination can the General Assembly or the State Department of Taxation allocate to

Ohio for property tax purposes that which is not within the territorial jurisdiction of the State, namely:

(1) Such notes and accounts receivable which were created, maintained and controlled entirely without the state of Ohio;

(2) Such prepaid insurance premiums on blanket insurance policies covering properties in West Virginia, Ohio and elsewhere, which insurance policies were delivered, paid for and kept in West Virginia.

Both the Tax Commissioner (see page 3 of the record) and the Board of Tax Appeals (see page 13 of the record) held that they were without authority to declare the applicable statutes (Sections 5325-1, 5328-1 and 5328-2 of the General Code) unconstitutional, thereby intimating considerable doubt as to validity of the statutes in question. While the court adopted the decision of the Board of Tax Appeals and sustained the assessment, this court did not weigh the board's doubt as to the constitutionality of the statutes. If this court is going to accept the decision of the board concerning taxable situs it should also follow the board's doubts as to constitutional validity. If this court disregards the board's doubts as to the constitutionality of the statutes in question, it should at least reexamine the facts and construe the statutes so as to eliminate any question of unconstitutional application. It is the responsibility of this court to hold these sections unconstitutional if they be found to offend any provision of the Constitution of Ohio or of the Constitution of the United States. It is also the duty of this court to construe a statute if possible in a manner so as to give it constitutional operation. (*Winslow Spacarb, Inc., Appellant, v. Evatt, Tax Commr., Appellee*, 144 Ohio St. 471). This court, in order to give the statutes in question a valid construction should, therefore, rule that such prepaid insurance premiums and such notes and accounts receivable of the Wheeling Steel Corporation did not arise out of business in Ohio and are therefore not subject to taxation in this state.

Such prepaid insurance premiums and such notes and accounts receivable have been subjected to an ad valorem tax in West Virginia (see *Stipulation of Facts*, Sec. 18, page 14, Appellant's Brief) under the authority of *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, wherein it was held that accounts receivable and other intangible property of said corporation



had a business situs in West Virginia. In *Ransom & Randolph Co. v. Evatt*, 142 Ohio St. 398 this court, commenting on the reciprocal provisions of Section 5328-2 of the General [fol. 106] Code, said at page 409:

"It is clear that it was the intention of the General Assembly that all property having a business situs in Ohio should be taxed in Ohio and that no property having a business situs outside of Ohio should be so taxed."

## II

Sections 5325-1, 5328-1 and 5328-2 of the General Code as applied and construed by this court are in violation of Article I, Section 8 of the Constitution of the United States for the identical prepaid insurance premiums and notes and accounts receivable of Wheeling Steel Corporation held by this court to have a taxable situs in Ohio are subject to multiple taxation so as to hinder and obstruct interstate commerce for the following reasons:

(a) Said prepaid insurance premiums and said notes and accounts receivable as intangible property may be subjected to taxation under the maxim *mobilia sequuntur personam* in the state of Delaware where the Wheeling Steel Corporation is incorporated and has its domicile. (*Newark Fire Insurance Co. v. Board of Tax Appeals*, 307 U. S. 313; *Greenhough v. Tax Assessors*, 331 U. S. 486.

(b) Said prepaid insurance premiums and said notes and accounts receivable are subject to taxation in West Virginia where the corporation has a commercial domicile and at which place said intangibles have become integral parts of [fol. 107] a local business in West Virginia so as to have a business situs there. In the Stipulation of Facts (See Sec. 18, page 14 of Appellant's Brief) it is stated as follows:

"All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942."

(See *Wheeling Steel Corp. v. Fox*, 298 U. S. 193)

(c) Said notes and accounts receivable under the theory of this court may be subject to property taxation also in the states in which the company's sales offices are located,

twelve out of thirteen of such offices being located in states other than Ohio.

(d) Said prepaid insurance premiums under the theory of this court may be subjected to property taxation also in the other states in which the corporation has property and which property is covered by the blanket policies of insurance for which such prepaid insurance premiums were paid.

### III

Sections 5325-1, 5328-1 and 5328-2 of the General Code as applied and construed by this court are in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Section 2 of Article I of the Constitution of Ohio for they deny appellant, [fol. 108] Wheeling Steel Corporation, the equal protection of the laws for the following reasons:

(a) The credits resulting from such notes and accounts receivable of this appellant are subjected to an ad valorem tax in Ohio, whereas like notes and accounts receivable of a domestic corporation resulting from the sale of goods manufactured in Ohio and sold by an agent having an office in another state would be exempt under Section 5328-2. (*Ransom & Randolph Co. v. Evatt*, 142 Ohio St. 398; *Haverfield Co. v. Evatt*, 143 Ohio St. 58).

(b) It is stipulated that the proceeds of such notes and accounts receivable (see Secs. 13 and 14, pages 13 and 14, Stipulation of Facts, Appellant's Brief) were under the control of the treasurer of the corporation at Wheeling, West Virginia and were applied indiscriminately to the general purposes of appellant's business whether in Ohio or elsewhere and, therefore, if appellant were an Ohio corporation its notes and accounts receivable would have been assigned a taxable situs in a state other than Ohio under Sections 5328-1 and 5328-2 of the General Code.

Thus, notes and accounts receivable arising under circumstances identical to those in the instant case are taxable in Ohio under the decisions of this court if owned by [fol. 109] a non-resident, but are exempt from taxation in this state if owned by a resident.

## IV

Sections 5325-1, 5328-1 and 5328-2 of the General Code as applied and construed by this court are in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States for the reason that this court has subjected the credits resulting from such pre-paid insurance premiums and such notes and accounts receivable of this appellant to an ad valorem tax in Ohio when said intangibles have not become integral parts of a local business in Ohio, so as to acquire a business situs in this state, are not within the territorial jurisdiction of this state and no benefit or protection has been accorded such notes and accounts receivable by this state nor to the corporation with respect thereto. *Wheeling Steel Corp. v. Fox*, 298 U. S. 193; *Tax Commission v. Aldrich*, 316 U. S. 174; *Greenhough v. Tax Assessors*, 331 U. S. 486.

Respectfully submitted, (S.) Carlton S. Dargusch,  
John Caren, Dargusch, Caren, Greek & King,  
44 E. Broad St. Columbus 15, Ohio, Attorneys  
for Appellant.

[fol. 110] BEFORE THE BOARD OF TAX APPEALS DEPARTMENT  
OF TAXATION OF OHIO

No. 9681

WHEELING STEEL CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

SECRETARY'S CERTIFICATE

I hereby certify the attached to be a true and correct transcript of the record of the proceedings of the Board of Tax Appeals of the Department of Taxation of Ohio pertaining to the decision complained of and all the evidence offered to and considered by the Board of Tax Appeals in making such decision.

(S.) Edward J. Kirwin, Secretary. (Seal.)



[fol. 111] BEFORE BOARD OF TAX APPEALS OF OHIO

ABSTRACT OF DOCKET

Appellant: Wheeling Steel Corporation No. 9681.

Appellee: C. Emory Glander, Tax Commissioner of Ohio.

Attorneys: Messrs. Dargusch, Garen, Greek and King, Columbus, Ohio, on behalf of the appellant.

Hon. Hugh S. Jenkins, Attorney General of Ohio, and Mr. Daronne R. Tate, Assistant Attorney General, on behalf of the appellee.

Filed: January 22, 1945.

Nature of appeal: Assessment against taxable credits.

Date of Hearing: September 13, 1945. Stipulation—September 27, 1945.

Journal Entry: April 7, 1947.

Appealed to Supreme Court: May 2, 1947.

[fol. 112] DEPARTMENT OF TAXATION, BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF APPEAL—Filed January 22, 1945

Appellant, Wheeling Steel Corporation, a Delaware corporation having its principal office at 1134 Market Street, Wheeling, West Virginia, hereby gives notice of appeal from the determination, finding or order of the Tax Commissioner, made under date of December 26, 1944 and bearing No. 544 on the records of such commissioner, to the Board of Tax Appeals. The following is a true copy of such determination, finding or order:

“DEPARTMENT OF TAXATION OF OHIO

Dec. 26, 1944.

No. 544

In the matter of the Application of THE WHEELING STEEL CORPORATION, WHEELING, WEST VIRGINIA, (Inter-county), for Review and Redetermination for the year 1942

The application of The Wheeling Steel Corporation, Wheeling, West Virginia, (Inter-County), for review [fol. 113] and redetermination of an additional tangi-

ble personal property tax assessment against such applicant for the year 1942, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that the application here under consideration is with respect to the denial by this department of a fair value claim covering average inventory values and which claim was filed with and at the time of the tax return for the year 1942.

The Tax Commissioner, being further advised in the premises, finds that the action as heretofore taken denying such fair value claim was in every respect proper and further finds that the average values as returned for inventories located in New Boston and Steubenville taxing districts were deficient in the amounts of \$111,010.00 and \$437,900.00, respectively, and further finds that the values as originally returned for 'machinery and equipment' in the 1942 tax return, which was located in New Boston, Steubenville, Yorkville and Martins Ferry taxing districts, were deficient in the amounts of \$1,447,320.00, \$1,114,980.00, \$2,352,310.00 and \$26,250.00, respectively.

At the time of said hearing, it was discovered that this department had failed to assess taxable credits for the tax year 1942 in the amount of \$2,093,450.00, and as to such proposed action, the applicant contested the validity of same with respect to allocating to Ohio certain of its accounts receivable on the grounds that the provisions of Section 5328-2, General Code, are not applicable and that the construction of Section 5328-1 and Section 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the Fourteenth amendment to the Constitution of the United States and the Constitution of the State of Ohio for as construed, such sections operate to tax intangible property of a non-resident over which Ohio has no jurisdiction and which has no business situs in Ohio.

As to such contention the Tax Commissioner holds that he is without authority to set aside acts of the Legislature on constitutional grounds, and further, it is the position of the Tax Commissioner that the assessment as herein ordered is in every respect proper in view of the decision of the Ohio Supreme Court in the case of Ransom & Randolph vs. Evatt, 142 O. S. 398,

[fol. 114] and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code.

In addition to the foregoing contentions, the applicant at the time of such hearing also raised the issue that the proposed action with respect to assessing net taxable credits was illegal and improper in that the accounts receivable which this department allocated to Ohio in computing net taxable credits, did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the Tax Commissioner that the receivables as allocated to Ohio in the computation of credits did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.

It is, therefore, ordered that corrected assessment certificates issue in conformity with the foregoing, which shall be final with respect to all taxable property as originally assessed and as herein ordered to be assessed.

Department of Taxation, William S. Evatt, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner, with respect to the above matter.

William S. Evatt, Tax Commissioner."

Said determination, finding or order is erroneous in that it assesses an ad valorem property tax against intangible property which is not within the territorial jurisdiction of the State of Ohio, contrary to the law of Ohio and the Fourteenth Amendment to the Constitution of the United States.

Wheeling Steel Corporation, by (S.) Dargusch, Carren, Greek and King, Its Attorneys.

[File endorsement omitted.]



[fol. 115] BEFORE TAX COMMISSIONER OF OHIO

February 9, 1945.

Appeal No. 9681

In the Matter of Appeal before the Board of Tax Appeals  
Filed by WHEELING STEEL CORPORATION 1942 Inter-County  
Return

CERTIFICATE OF TAX COMMISSIONER

I hereby certify that the papers hereto attached are a complete transcript of the record of the proceedings before the Tax Commissioner of Ohio, together with all evidence, documentary and otherwise, considered by him in connection with the assessment therein described.

Department of Taxation (S.) C. Emory Glander, Tax  
Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

(S.) C. Emory Glander, Tax Commissioner.

Filed Feb. 10, 1945, Board of Tax Appeals.

## STATE OF OHIO

W-57

Tax Form 905 V - Prescribed by  
C. Emory Glander, Tax Commissioner

No. 1206

Name Wheeling Steel Corp  
 Street 1134 Market St.,  
 Post Office Wheeling, W. Va.

C O P Y

**PRELIMINARY  
 ASSESSMENT CERTIFICATE**  
 (TAX COMMISSIONER'S COPY)

Date

19

The Tax Commissioner hereby certifies that the following is the preliminary assessment of the taxable property of the above named taxpayer chargeable on the intangible property Tax List and Duplicate of the Auditor of State for the year 1942 Dec. 26, 1944

CLASSIFIED TAX LIST				RET. FORM NO. 945			
				TOTAL	RATE	AMOUNT OF TAX	
Investments yielding income				\$	5%	\$	
Investments not yielding income					.002		
Deposits					.002		
Credits				2 093 450	.003	6 280 35	
Moneys and other Taxable Intangibles					.003		
TOTAL CLASSIFIED TAX				\$	**	\$	

Per detail - No former 1942 assessment for this Co.

ad

(SEAL)

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*[Signature]*  
 Tax Commissioner







# Recapitulation of Classified or Intangible Personal Property Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Productive Investments.....	None	5%	None
Item 2 (From Schedule 7) Unproductive Investments.....	"	2 mills	"
Item 3 (From Schedule 8) Deposits .....	"	2 mills	"
Item 4 (From Schedule 9) Credits <i>Pay de Int. - 12/26/41</i>	113 450	3 mills	6 95
Item 5 (From Schedule 10) Money and Other Taxable Intangibles.....	"	3 mills	"
Total Amount—Aggregate Listed Value and Classified Tax (Add above Classified amounts).....	None	.	None

## OATH

(Corporate seal should be impressed  
so as not to affect the legible reading  
of any written words or figures.)

STATE OF ~~OHIO~~ West Virginia Ohio COUNTY, ss.:

We do solemnly swear that we are the R. D. Swinburne and the Comptroller of the above named Corporation and do further swear that the answers which we have given to the specific questions asked in the foregoing tax return, so far as within our knowledge, are true; that the list contains a full disclosure of all property required by law to be listed for taxation on behalf of said Corporation; that the amounts which we have set down therein in our itemization of taxable property are, so far as they represent facts within our knowledge, true and correct; and that, in all cases in which we have answered any such question, or given any such amount, otherwise than from our own positive knowledge, such answer or amount represents our opinion and judgment, based upon the best information available to us.

SWORN to and subscribed before me this 30th day (Sign here) .....

of March, 1942 Title .....

Malby Liston (Sign here) R. D. Swinburne  
Deputy Auditor—Notary—Deputy Assessor.

Title .....

Was this Return prepared by persons within your own organization?..... If answer is "NO," show in space below the name and address of person or firm who prepared the return:

Name ..... Address .....

C O P Y



NAME OF CORPORATION.....WHEELING STEEL CORPORATION.

This return is made by the above named corporation as holder of fifty-one per cent or more of the common stock of the following named corporations.

This corporation or (if this is a ~~Consolidated return~~) one or more of its subsidiaries held at listing date personal property in the following counties in Ohio.

COUNTY	Kind of Business	Name under which business conducted in each location
Belmont	Fabricating Steel	WHEELING STEEL CORP.
Cuyahoga	Ore Storage	" " "
Cuyahoga	Selling Steel Prods.	CONSOLIDATED EXPANDED METAL COS.
Franklin	" " "	WHEELING CORRUGATING CO.
Jefferson	Manf. Steel Prod.	WHEELING STEEL CORP.
Scioto	" " "	" " "

Note - We also own consigned stocks of pipe located in several other counties in Ohio. - See Form 945-C-7 for detail.



MACHINERY AND EQUIPMENT.

List here all property of the following kinds owned by the Corporation and used in business in this State on listing day: Engines, machinery, tools and implements used in (a) Agriculture, (b) Refining and Manufacturing, (c) Mining, (d) Machinery, Tools and Implements used in Laundries and Dry Cleaning Plants, (e) Stone Plants, (f) Gravel Plants. Also list here repair parts for equipment mentioned herein.

List separately property used in each Taxing District.

LISTED VALUES

Used in or held for production

- (a) Agriculture
  - (b) Refn'g & Mfg.
  - (c) Mining
  - (d) Laundries & Dry Cleaning
  - (e) Towel & Linen Supply
  - (f) Stone Plants
  - (g) Gravel Plants
- 50% of Dep. Book Value

County	Taxing District	Description	Depreciated Book Value			Total Depreciated Book Value			(e) Lower & Lines Supply (f) Stone Plants (g) Gravel Plants 50% of Dep. Book Value		
		WHEELING STEEL CORPORATION (PARENT)									
Belmont	Martins Ferry	Covered by formal book accounts						308410		154	200
Jefferson	Steubenville	" " " " "				4	993260		2	496	630
Jefferson	Yorkville	" " " " "				2	164440		1	082	220
Scioto	New Boston	" " " " "					511010			255	500
							7	977120		3	977550
		WHEELING CORRUGATING COMPANY									
Franklin	Columbus	Covered by formal book account.						3590			1790
		CONSOLIDATED EXPANDED METAL COMPANIES									
Cuyahoga	Cleveland	Covered by formal book account						-0-		-0-	
										3	990340
		COPY									

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INTER COUNTY

## BALANCE SHEET

For WHEELING STEEL CORPORATION  
(Name)

WHEELING, W. Va.  
(Address)

### INSTRUCTIONS FOR BALANCE SHEET

#### GENERAL INSTRUCTIONS.

A Balance Sheet (Form 911) must be filled out and filed with Form 910 by all individuals, partnerships, and associations engaged in business. This balance sheet is a confidential document which may be enclosed in a special envelope marked for the Tax Commissioner and must be filed with the County Auditor at the time of making the tax return.

Tangible personal property used in business or credits must be listed at BOOK VALUE, which is to be taken as the true value unless the assessor shall find otherwise. The tax return therefore is required to be made upon the figures of the book accounts; and, generally, the making of the tax return may best be begun by preparing the balance sheet.

#### BOOK VALUES REQUIRED.

The balance sheet is to be in accord with the figures as at the year end used for Federal Income Tax purposes, unless a permit has been granted by the Tax Commissioner for the use of a date different from that used on the Federal return.

The first three columns provide space for reporting divisions of the book accounts in accordance with special exemptions or differentiations of values or rates to which any business may be entitled, or to segregate classes of taxable and non-taxable property.

Separation of "Within Ohio" and "Without Ohio" of tangible personal property (other than watercraft and aircraft) depends on physical location.

In the third column are to be shown the "Within Ohio" figures as at the beginning of the current taxable year. The figures (if any) for "Without Ohio" as at the date need be set down only in total at the end for the purpose of effecting proper balance. If the business was begun during 1942 this column should contain figures as at the beginning of business.

Any taxpayer having a printed balance sheet is requested to enclose a copy as an extra with this form duly completed.

#### BALANCE SHEET AND SCHEDULE NUMBERS.

Each heading and line for entry of amount has a Balance Sheet Number for convenience of reference to tax return or for correspondence.

In the column headed "Schedule Number" there appears for each item either a number referring to the schedule on the tax return in which such item should be listed, or a dash to indicate that such item is ordinarily non-taxable.

In several places where the taxpayer may be obliged to write a description of assets for which no printed line is provided, the asterisk indicates that the listing is to be in the appropriate schedule.

In connection with lines 6, 38, 44, 56, 86 and 91, the taxpayer is expected to distinguish between the taxable and nontaxable amounts in accordance with the instructions relating to the tax return.

#### SPECIAL DETAILS.

Item 2 represents cash taxed at the source and includes deposits which may have been in state banks or building and loan associations in Ohio that were closed on November 9, 1942, arrangements having been made with these institutions to pay the proper tax. As no such arrangements have been made regarding deposits in closed National banks, a listing for line 3 must be made in Schedule 10 of the tax return.

Lines 28 and 29, which refer to work in process and finished goods of manufacturers or refiners, shall have included in their amounts the labor and factory burden properly applicable.

As to line 55, Prepaid Tangible Items, see Specific Instructions relative to Schedule 9 in Instructions Form 910-A.

On line 67 shall be entered the book value of machinery and equipment which is actually taxed with buildings as real estate. A breakdown on this account is to be furnished in Schedule D on Page 4 of this form, while an explanation of additions, deductions and depreciation is to be submitted in Schedule C on Page 4 of this form.

For line 71, Machinery and Equipment Leased or Loaned to Others, the amount should be entered in Schedule 4 of the tax return, if the maker of this return is to pay the tax.

Under the heading of Other Taxable Items on line 86 may be entered the book value of such items as molds, flasks, etc.

Under the heading of Other Non-Taxable Items on line 91 should be entered the book value of patterns, dies, jigs and drawings.

#### SUPPLEMENTAL INFORMATION.

Schedule A provides for the computation of credits taxable in Ohio when business localization of the accounts receivable of a resident taxpayer occurs outside of Ohio or business localization of the accounts receivable of a non-resident taxpayer occurs within Ohio. When the situs occurs wholly within Ohio, Schedule 9 of the tax return provides for the complete computation of taxable credits.

Schedule B provides for a transcript of certain nominal accounts as reported on the taxpayer's Federal Income Tax Return.

Schedule C provides for an explanation of additions, deductions and depreciations in connection with all Fixed Assets. Special attention is directed to the use of this exhibit as it applies to items on lines 67, 69 and 73 of the balance sheet.

Schedule D provides for a detailed description or breakdown of items which are combined in one account on the balance sheet, as for example, Prepaid Other Intangible Items on line 54. Complete information in this exhibit will save much correspondence later.

#### SCHEDULE A COMPUTATION OF CREDITS TAXABLE IN OHIO

Bal. Sheet No.	(a) Within Ohio	(b) Total
12 Current Notes Receivable.....	None	\$ 1189,060
20 Current Accounts Receivable.....	"	6,122,450
51 Prepaid Insurance .....	"	366,000
52 Prepaid Taxes .....	"	
53 Prepaid Interest .....	"	
54 Prepaid Other Intangibles.....	"	
Total Current Receivables.....	"	\$ 9,679,510
Percentage of (a) to (b).....	"	%
100 Current Notes Payable.....	"	\$ 4,682,280
102 Current Accounts Payable.....	"	353,560
106 Accrued Expenses, Interest.....	"	
108 Accrued Expenses, Other .....	"	
Total Current Payables .....		\$ 5,035,840
Total Credits (Receivables less Payables) .....		\$ 4,643,670
Credits Taxable in Ohio.....	%	
(from above) .....		\$ None
(Carry this amount to Schedule 9, of Tax Return.)		



## Balance Sheet for Individuals, Partnerships and

FOR (Name).....

(Address).....

ITEMS		END OF TAXABLE YEAR		Beginning of Tax- able Year.	These Columns for Use of County Auditor or Tax Commissioner	
Item Number	Schedule Number	ASSETS	WITHIN OHIO AMOUNT	WITHOUT OHIO AMOUNT	Within Ohio AMOUNT	
1		<b>CASH:—</b>				
2		In Ohio Banks or Bldg & Loan Associations Taxed at Source.....	\$ 313,778 00		\$ 163,332 00	
3	10	In National Banks in Ohio Closed November 9, 1942.....			—0—	
4	8 or 10	On Deposit Elsewhere in Ohio.....			—0—	
5	10	On Hand or in Strong Box.....			—0—	
6	6 or 8	On Deposit Outside Ohio:— Taxable in Ohio.....		\$ 2,062,756 46		
7		Not Taxable in Ohio.....				
8		<b>NOTES</b>				
9		<b>RECEIVABLE</b> ..... \$ 1,215,434.42				
10		Bad Debt Reserve (per Books)..... \$ 26,431.64				
11		Balance..... \$ 1,189,002.78				
12	9	Due Within One Year from Date of Inception.....		\$ 1,189,002 78	\$ —0—	
13		Due After One Year from Date of Inception.....			—0—	
14	6	Interest Bearing (Productive).....			—0—	
15	7	Interest Bearing (Non-Productive).....			—0—	
16	10	Non-Interest Bearing.....			—0—	
17		<b>ACCOUNTS</b>				
18		<b>RECEIVABLE</b> ..... \$ 8,370,595.10				
19		Bad Debt Reserve (per Books)..... \$ 248,146.11				
20		Balance..... \$ 8,122,448.99				
21	9	Due Within One Year from Date of Inception.....		\$ 8,122,448 99	\$ —0—	
22		Due After One Year from Date of Inception.....			—0—	
23	6	Interest Bearing (Productive).....			—0—	
24	7	Interest Bearing (Non-Productive).....			—0—	
25	10	Non-Interest Bearing.....			—0—	
26		<b>INVENTORIES:—</b>				
27	3	<b>MANUFACTURING OR REFINING</b>				
28		Raw Materials.....	\$ 6,048,449 82	\$ 3,702,231 82	\$ 5,650,417 76	
29		Work in Process (Including Burden).....	1,970,735 83	1,867,810 25	2,675,135 28	
30		Finished Goods (County of Manufacture).....	4,701,827 90	4,945,431 35	6,686,347 39	
31		Stored in Other Ohio Counties.....	64,804 36		75,196 51	
32		Supplies used in Manufacturing.....	2,257,507 58	1,094,575 67	1,860,664 24	
33		<b>MERCHANDISING, MINING and OTHER:</b>				
34	3	Goods held for sale.....				
35	4	Supplies not used in Manufacturing.....				
36		Goods Consigned to Others.....	42,238 00	1,287,203 19	36,547 00	
37		Goods not subject to property tax Dues & Work Halls—tax exempt	1,565,047 51		2,179,820 48	
38		Other.....	1,630,587 90		1,429,325 40	
39		<b>INVESTMENTS—Non-Taxable:</b>				
40		Federal Bonds.....			—0—	
41		Ohio Subdivision Bonds Issued Prior to January 1, 1913.....			—0—	
42		Bank Stocks.....			—0—	
43		Other.....		2,879,065 55	—0—	
44		U.S. Gov. Tax anticipation notes and Treasury bills.....		12,350,000 00		
45		<b>INVESTMENTS—Taxable:</b>				
46	6 or 7	Public Bonds.....			—0—	
47	6 or 7	Industrial and Other Bonds.....		2 00	—0—	
48	6 or 7	Corporation Stocks.....			—0—	
49	6 or 7	Notes and Mortgages.....			—0—	
50	6 or 7	Other.....		75,510 72	—0—	
51		<b>DEFERRED CHARGES:—</b>				
52	9	Prepaid Insurance.....		368,006 77	—0—	
53	9	Prepaid Taxes.....		114,472 89	—0—	
54	9	Prepaid Interest.....			—0—	
55	9	Prepaid Other Intangible Items (Detail in Schedule D).....		198,345 40	—0—	
56	4	Prepaid Tangible Items (Detail in Sch. D).....			—0—	
57		Unamortized Items (Detail in Sched. D).....		1,847,431 00	—0—	
58	6	<b>PATENTS &amp; COPYRIGHTS—Yielding Roy- alties or Other Income during taxable year.....</b>			—0—	
59		<b>PATENTS &amp; COPYRIGHTS—Not Yielding Royalties or Other Income during taxable year.....</b>			—0—	
60		Cash deposit with Bond Trustees.....		1 00	—0—	
61		Due from Employees stock sub.....		300 00	—0—	
62		<b>OTHERS</b> .....		157,283 11	—0—	
63		(Describe) Inter-Co. Accts Rec.....		7,734,961 79	—0—	
64		<b>Totals Carried Forward.....</b>	\$ 20,394,975 70	\$ 50,802,540 24	\$ 20,756,856 06	

\*List in Appropriate Schedules on Tax Return.



# Partnerships and Associations in Business

Year ended \_\_\_\_\_, 19\_\_\_\_. Indicate whether this Year End corresponds with that on your Federal Income Tax Return. ☐ Yes. ☐ No

(Month) (Day)

County Order	ITEMS		ASSETS—(Continued)	END OF TAXABLE YEAR				Beginning of Tax- able Year.		These Columns for Use of County Auditor or Tax Commissioner	
	Rel. Sec. Number	Schedule Number		WITHIN OHIO		WITHOUT OHIO		Within Ohio			
				AMOUNT		AMOUNT		AMOUNT			
	62		Totals Brought Forward	20,594,975	70	50,002,540	24	20,756,856	06		
	63		FIXED ASSETS:								
	64		Land	\$		\$		\$			
	65		Buildings \$95,288,734.43								
	66		Depreciation (Book) 36,402,864.01	40,238,100	38	18,647,770	04	40,686,661	42		
	67		Machinery & Equipment								
			Taxed as Real Estate \$								
	68		Depreciation (Book)								
	69	2 or 4	Machinery & Equipment								
			Not Taxed as Real Estate \$25,043,204.06								
	70		Depreciation (Book) 16,790,173.96	7,980,713	95	272,316	15	7,804,981	21		
	71	4	Machinery & Equipment								
			Leased or Loaned to Others \$								
	72		Depreciation (Book)					-0-			
	73	4	Furniture and Fixtures \$763,909.87								
	74		Depreciation (Book) 399,502.12	116,455	04	287,952	71	97,376	59		
	75		Delivery Equipment:								
	76		Registered Motor Vehicles \$278,357.59								
	77		Depreciation (Book) 115,343.57	98,157	26	124,856	76	17,612	55		
	78	4	Other Vehicles \$								
	79		Depreciation (Book)	-0-		-0-		-0-			
	80	1	Domestic Animals \$								
	81		Depreciation (Book)	-0-		-0-		-0-			
	82	4	Watercraft \$								
	83		Depreciation (Book)	-0-		-0-		-0-			
	84	4	Aircraft \$								
	85		Depreciation (Book)	-0-		-0-		-0-			
	86		Other Taxable Items:								
	87		\$								
	88		Depreciation (Book)	-0-		-0-		-0-			
	89		\$								
	90		Depreciation (Book)	-0-		-0-		-0-			
	91		Other Non-Taxable Items:								
	92		\$								
	93		Depreciation (Book)	-0-		-0-		-0-			
	94		\$								
	95		Depreciation (Book)	-0-		-0-		-0-			
	96		Assets Within Ohio at Beginning of Tax- able Year	X X X	X	X X X	X	62,373,487	83		
	97		Assets Without Ohio at Beginning of Tax- able Year	X X X	X	X X X	X	60,220,566	50		
	99		TOTAL ASSETS	68,968,402	33	69,335,435	29	120,594,054	33		

## LIABILITIES

			End of Taxable Year		Beginning of Taxable Year	
100	9	NOTES PAYABLE:—(Due within one year from date of inception)	\$1,200,000	00	\$2,000,000	00
101	—	NOTES PAYABLE:—(Due after one year from date of inception—not deductible in Schedule 9)	4,800,000	00	-0-	
102	9	ACCOUNTS PAYABLE:—(Due within one year from date of inception)	4,689,285	79	2,829,548	18
103	—	ACCOUNTS PAYABLE:—(Due after one year from date of inception—not deductible in Schedule 9)			-0-	
104						
105	—	BONDS AND MORTGAGES	30,000,000	00	31,500,000	00
106	9	ACCRUED EXPENSES—Interest	353,500	00	588,780	00
107	—	Taxes and Assessments (not deductible in Schedule 9)	8,450,349	73	2,412,801	46
108	9	All Other (Describe Fully)	165,570	42	120,839	38
109	—	OTHER LIABILITIES:—(Describe fully) Reserve for Contingencies	2,017,963	99	1,366,022	49
110		Reserve for relining furnaces, etc	555,601	76	674,847	13
111		CAPITAL INVESTMENT	64,800,300	00	66,278,900	00
112						
113		SURPLUS (Capital)	590,100	47	563,415	91
114		UNDIVIDED PROFITS	20,681,086	16	18,258,599	78
115		<b>TOTAL LIABILITIES</b>	\$128,293,898	23	\$129,594,054	22



Page 4  
SCHEDULE B—ACCOUNTS AS REPORTED ON FEDERAL INCOME TAX RETURN.

1. State kind of business.....	
2. Total receipts from business or profession for taxable year.....	\$.....
3. Inventory at beginning of year.....	
4. Merchandise bought for sale.....	
5. Labor.....	
6. Other Costs.....	
7. Inventory at end of year.....	
8. Bad debts charged off.....	
9. Depreciation.....	

SCHEDULE -C Additions, Deductions And Depreciation of Fixed Assets.  
To be Answered By All Taxpayers Engaged in Business.

1. Total distributions to stockholders charged to earned surplus during the taxable year	\$4,021,832.25
2. Contributions or gifts (excess over 5 percent limitation)	
3. Federal income taxes	2,777,015.20
4. 5. 6. Show total per Federal	
7. Replacements, renewals, and capital expenditures charged to expense on the books	
8. 9. 10. Show total per Federal	
11. Additions to surplus reserves (list each reserve separately):	
(a) Contingencies	908,617.02
(b) Relining & Rebuilding	1,161,012.50
(c) Bad Debts	10,950.00
12. Other allowable deductions:	
(a) Interest on 4 1/2 bonds	538.46
(b) Depletion adjustment	130,564.88
13. Adjustments for tax purposes not recorded on books (itemize):	
(a) To adjust Federal income tax	2,768.05
(b) To adjust Capital Stock Tax	34,484.45
Unearned interest	89,469.44
14. Carry debits to earned surplus (itemize):	
To adjust Capital Surplus A/C 68	42,669.11
Preferred Stock	
15. Earned surplus and undivided profits as shown by balance sheet at close of the taxable year	20,681,086.16
16. Total of lines 1 to 15	29,861,067.52

XXXXXXXXXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

17. Earned surplus and undivided profits as shown by balance sheet at close of preceding taxable year	18,258,899.78
18. Adjusted net income	9,820,109.73
19. Nontaxable and partially exempt income:	
(a) Interest	
(b) Other nontaxable income (itemize):	
Taxes paid 1940 Capitalized	1,824.85
20. Charges against surplus reserves deducted from income in the return (itemize):	
(a) Contingencies	436,379.81
Relining & Rebuilding	1,280,257.87
Bad Debts	4,743.56
21. Adjustments for tax purposes not recorded on books (itemize):	
(a) 19 <sup>th</sup> & 35 <sup>th</sup> Bleeding Mill-Steub	58,874.92
(b)	
22. Sundry credits to earned surplus (itemize)	
(a)	
(b)	
23. Total of lines 17 to 22	29,861,067.52

\*Analysis of Additions, Deductions and Adjustments—Items 3, 4, & above. The information requested in in schedule "D" is extremely voluminous and will be made available by the Corporation upon request of the Department of Taxation.

SCHEDULE D—ANALYSIS OF BALANCE SHEET ACCOUNTS.

Bal. Sheet No.	DETAILED DESCRIPTION	Bal. Sheet No.	DETAILED DESCRIPTION
	Land, Buildings & Equipment taxed as Real Estate		
62	Land Belmont County		\$1,223,595
to	Jefferson County		30,343,715
68	Marion County		149,737
and	Scioto		8,521,060

State whether the Tax Return and Balance Sheet were prepared by ☒ you or ☐ an outside accountant or attorney.  
If forms were prepared by an outside accountant or attorney, give name and address below:

Was an audit report the basis of the figures? ☐ Yes. ☐ No.

OATH

STATE OF OHIO West Virginia, Ohio COUNTY, ss.

R. D. Swinburne being duly sworn, says that the statements in the foregoing balance sheet are true.

SWORN to and subscribed before me this 30th day of

March 1942

G. D. Swinburne

Individual Member of Partnership-Member of Association

Malby Liston

Auditor-Notary-Deputy Assessor



**Corporation Return of Taxable Property for 1948 1942**  
**Inter-County or Consolidated**

IF A CONSOLIDATED RETURN IS FILED A CONSOLIDATING BALANCE SHEET, INCLUDING ALL CONTROLLED SUBSIDIARIES, IS REQUIRED.

NAME OF CORPORATION WHEELING STEEL CORPORATION

This return is made by the above named corporation as holder of fifty-one per cent or more of the common stock of the following named corporations.

N A M E	ADDRESS	State in which Organized	Date of organization	Number shares of Outstanding Common Stock	Number owned by reporting company	No. shares owned by Ohio Individuals
Wheeling Corrugating Co.	West Virginia		June 29, 1917	10,000	10,000	None
Consolidated Expanded Metals Companies	W. Virginia		June 11, 1929	500	500	None

This corporation or ~~its subsidiaries~~ one or more of its subsidiaries held at listing date personal property in the following counties in Ohio.

C O U N T Y	T A X I N G D I S T R I C T	Name under which business conducted in each location
Belmont	Fabricating Steel	WHEELING STEEL CORP
Cuyahoga	Ore Storage	" " "
Cuyahoga	Selling Steel Prods.	CONSOLIDATED EXPANDED METALS CO.
Franklin	" " "	WHEELING CORRUGATING CO.
Jefferson	Manf. Steel Prod.	WHEELING STEEL CORP.
Scioto	" " "	" " "

Note - We also own consigned stocks of pipe located in several other counties in Ohio. - See Form 945-C-7 for detail.



# Recapitulation of Classified or Intangible Personal Property

## Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Investments Yielding Income.....	\$ None	5%	None
Item 2 (From Schedule 7) Investments Not Yielding Income.....	"	.002	"
Item 3 (From Schedule 8) Deposits.....	"	.002	"
Item 4 (From Schedule 9) Credits <i>7th Street - 3rd floor 12/2-144</i>	<i>201-40</i> "	.003	<i>62.135</i> "
Item 5 (From Schedule 10) Money and Other Taxable Intangibles.....	"	.003	"
Total Amount Aggregate Listed Value and Classified Tax.....	\$ None	..	None



**SCHEDULE 3. INVENTORY—MANUFACTURING—REFINING.**

List here an average value of a classified inventory of all personal property owned and used by the Corporation IN THIS STATE in MANUFACTURING or REFIN-  
ING, and subject to be listed on the AVERAGE VALUE basis for the year or part thereof.

(Check the respective source of figures.) ☒ Physical Inventory; ☒ Perpetual Book Inventory. ☐ Gross Profit Method. State date of last Physical Inventory;

Dec. 31, 1941

Check Method of Pricing Inventory ☒ Cost; ☐ Market.

Inventory of finished products used in manufacturing or refining NOT KEPT or STORED at the place of manufacture or in a warehouse IN THE COUNTY where manufactured or inventory held for retail sale MUST BE LISTED AS MERCHANDISE on Form No. 945 C-7.

**List separately property used in each Taxing District.**

[illegible]



List here an estimated average value of a classified inventory of all personal property owned and used by the Corporation IN THIS STATE as MERCHANDISE, and subject to be listed on the AVERAGE VALUE basis for the year or part thereof.

(Check the respective source of figures.) ☒ Physical Inventory; ☒ Perpetual Book Inventory. State date of last Physical Inventory: December 31st, 1941

Check the Inventory Method ☒ Cost; ☐ The Lower of Cost or Market; ☐ Other Methods, outline below \_\_\_\_\_

Inventory of finished products used in manufacturing or refining NOT KEPT or STORED at the place of manufacture or in a warehouse IN THE COUNTY where manufactured MUST BE LISTED AS MERCHANDISE.

List separately property used in each Taxing District. To list as per book account, see Form 945-C7, Page 1

County	Taxing District	January	February	March	April	May	June	July	August	September	October	November	December	Total Monthly Inventory Values	Average Monthly Inventory Value (divide by total number of months in business)	Listed Value 70% of Average Value
WHEELING CORRUGATING COMPANY																
Franklin	Columbus	68 250	77 260	85 260	71 000	72 340	67 560	55 980	77 340	52 710	48 310	32 800	38 900	748 410	62 370	43 660
CONSOLIDATED EXPANDED METAL COMPANIES																
Cuyahoga	Cleveland	24 980	27 730	30 860	29 490	30 890	32 170	31 670	21 030	19 080	21 370	25 300	25 910	320 480	26 710	18 700
CONSIGNEE PIPE STOCKS-WHEELING STEEL CORP.																
Aulaize	St. Marys	3 440	5 440	4 900	3 640	3 920	4 060	3 850	2 540	3 800	2 600	4 000	2 760	44 950	3 750	2 620
Cuyahoga	Cleveland	5 450	6 320	5 420	6 330	8 200	6 130	5 870	4 020	4 570	4 810	2 310	4 370	63 820	5 320	3 720
Franklin	Columbus	-0-	1 360	2 320	1 180	1 130	980	1 750	2 930	2 700	4210	780	2 650	21 990	1 830	1 280
Franklin	Columbus	3 590	4 610	4 170	6 230	3 850	3 280	8 690	3 820	6 990	5 020	5 820	6 450	62 510	5 210	3 650
Franklin	Columbus	3 220	3 870	3 130	3 600	2 870	2 690	2 020	3 200	3 030	2 840	2 570	1 960	34 900	2 910	2 040
Hamilton	Cincinnati	4 410	2 640	3 230	1 910	3 260	3 370	5 690	-0-	-0-	-0-	-0-	-0-	24 410	2 030	1 420
Hancock	Findlay	8 990	8 430	9 420	7 580	7 070	5 600	5 670	6 610	6 770	4 820	7 690	9 050	87 700	7 310	5 120
Montgomery	Dayton	3 490	6 240	5 910	5 500	3 430	3 840	4 760	5 410	3 340	2 360	2 060	5 850	52 190	4 350	3 040
Scioto	Portsmouth	3 140	4 330	3 740	4 020	3 950	4 600	3 060	2 840	5 090	2 170	2 860	4 540	44 340	3 690	2 580
Summit	Akron	4 230	4 740	5 080	6 960	7 890	5 460	5 960	4 630	4 530	5 060	3 350	4 290	62 080	5 170	3 620
Wood	Wayne	1 240	1 830	1 860	1 800	690	690	1 200	510	930	1 800	370	310	13 630	1 140	800
COPY																



**INSTRUCTIONS—Use of Form 945 C-8.**

This Form is to be used by all companies engaged in manufacturing, in listing such items as office furniture and fixtures, and by the corporations engaged in merchandising, in listing all personal property other than inventory, such as fixtures and equipment. This schedule should also be used by corporations engaged in service enterprises such as Hotel Keeping, Garages, Contracting, Restaurants, Amusements, Storage, Transportation, etc., in listing all personal property, including furniture, fixtures, tools, machinery, implements and/or such other personal property used in business. Instructions on the use of Form 945 C-7 relative to county and taxing district will also apply to this schedule.

Segregate leased machinery and/or equipment and give name and address of lessor.

List values in dollars only and make all items end in 0, viz., 100—110—120.



MACHINERY AND EQUIPMENT.

List here all property of the following kinds owned by the Corporation and used in business in this State on listing day: Engines, machinery, tools and implements used in (a) Agriculture, (b) Refining and Manufacturing, (c) Mining, (d) Laundries and Dry Cleaning Plants, (e) Towel and Linen Supply Plants, (f) Stone and Gravel Plants. Also list here repair parts for equipment mentioned herein. If value of equipment below is based on "True Value" computation, attach detail "Description of Business", page B, must justify manufacturing classification.

List separately property used in each Taxing District.

County	Taxing District	Description	Depreciated Book Value	Total Depreciated Book Value
WHEELING STEEL CORPORATION (PARENT)				
Belmont	Martins Ferry	Covered by formal book accounts		308410 154200
Jefferson	Steubenville	" " " " "	4	993260 2 496630
Jefferson	Yorkville	" " " " "	2	164440 1 082220
Scioto	New Boston	" " " " "		511010 255500
			7	977120 3 988550
WHEELING CORRUGATING COMPANY				
Franklin	Columbus	Covered by formal book account.		3590 1790
CONSOLIDATED EXPANDED METAL COMPANIES				
Cuyahoga	Cleveland	Covered by formal book account.		-0- -0-
				3 990340
CCPY				

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SCHEDULE 2

Form No. 945

# OATH

SECTION 5522 G. C.

The State of West Virginia, County of Ohio, ss.:

R. D. Swinburne being duly sworn, deposes and says that he is

the Comptroller of The above named Company that he executed the foregoing report in the name of and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make said statement, and to execute the same, by authority of the corporation and further, such corporation has not during the preceding year, directly or indirectly paid, used or offered, consented or agreed to pay or use, any of its money or property for, or in aid of, any political party, committee or organization, or for, or in aid of, any candidate for political office, or for nomination for any such office, or in any manner used any of its moneys or property for any political purpose whatsoever or for the reimbursement or indemnification of any person or persons for moneys or property so used, and that he is an officer of said corporation, having knowledge of the facts herein set forth, and that the statements contained in said report and in this affidavit are true.

R. D. Swinburne

Sworn to before me, and subscribed in my presence, this 30th day of March, A. D., 1942

Malby Liston

Notary Public

C O P Y

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### RECAPITULATION OF LISTED VALUES OF TANGIBLE PERSONAL PROPERTY

[illegible]

## RECAPITULATION

Form No. 945-D

C O P Y







Name of Owner	Address of Owner	Description	County where located	Value
Telautograph Corp	16 W. 61st Street N Y N Y	Telautograph Jefferson Equipment		
International Business Machine Corp	World Headquarters Bldg, N.Y. N. Y.	Tabulating Equipment		
<p>What tangible personal property not owned by the Corporation and not shown on its balance sheet did it hold as LESSOR, on CON-SIGNMENT, under CON-DITIONAL SALES CON-TRACT or under SIMILAR AGREEMENT on the day as of which the Corporation has listed its own property?</p> <p>In the event the taxpayer filing this report is required to pay the tax on any of this property, please list same on schedules 1-C to 8-C as case may require.</p>				
<p>Note - See copies of letters written by above named owners filed with the Dept. of Taxation's copy of our 1935 return</p>				

## CHANGES IN VALUATION OF REAL ESTATE OWNED OR OCCUPIED

NEW BUILDINGS, STRUCTURES OR IMPROVEMENTS MADE OR  
ERECTED OR MINERAL DEPOSITS DEVELOPED SINCE APRIL 12,  
1942.

Addition to Lithographing Building  
Kind of building, structure improvement or mineral development

at our Yorkville Works \$175,000  
Increase in value

Yorkville, Ohio  
On what lot or lands situated

Yorkville Jefferson County  
Taxing District County, Township or Municipality

BUILDINGS, STRUCTURES OR IMPROVEMENTS DESTROYED, IN-  
JURED OR REMOVED WHOLLY OR IN PART SINCE OCTOBER 1,  
1942 AND NOT RESTORED OR TO BE RESTORED PRIOR TO APRIL  
11, 1943, OR THE EXHAUSTION OR ABANDONMENT OF MINERAL  
DEPOSITS WITHIN THE PAST YEAR.

None

Kind of building, structure, improvement or mineral depletion or abandonment

Decrease in value

On what lot or lands situated

Taxing District County, Township or Municipality

## REPORT AS TO OWNERSHIP, YIELDS AND VALUES OF STOCK

Tax form No. 930 filed January 14, 1942

and tax forms No. 930 filed January 14, 1942

	Par Value	Dividend per share in 1942	Market quotation	Number of Ohio Stockholders Corporations omitted
Common Stock	No par	\$2.00	25-1/4	835
Preferred Stock \$5. Cumulative				
convertible Prior preferred	No par	\$5.00	63	415

IF THE CORPORATION ACTED IN ANY FIDUCIARY CAPACITY FOR A NON-RESIDENT OF OHIO OR FOR A CORPORATION NOT AD-MITTED TO DO BUSINESS IN OHIO THE FOLLOWING INFORMATION MUST BE SUBMITTED.

Capacity	Name of Principal	Address	Nature of Business
	N O N E		



## CLAIM FOR DEDUCTION FROM BOOK VALUE-----FORM 902

C O P Y

Made by (Name) Wheeling Steel CorporationAddress Wheeling, West VirginiaDate December 31 1941

The undersigned taxpayer, having duly listed ~~book value~~ its tangible personal property used in business on County Auditor's Tax Form NO 945 as ☐ Individual, ☐ Partnership, ☒ Corporation, ☐ (Fiduciary), and with it transmitted a balance sheet or financial statement of the business on Form NO 911, hereby makes claim for the assessment of such property, or portions thereof as herein stated, on basis of its true value, instead of the book value, less book depreciation, as duly listed in the tax return.

(Omit cents in setting down amounts.)

TAXING DISTRICT (Fill in name)	TANGIBLE PROPERTY	Domestic Animals & Products	Engines, Mach. Tools & Implements	Manufactur- ing & Merchandise Inventory	Personal Property Used in Business	Aircraft & Air- craft Equipment	TOTALS
1. <u>See reverse</u>	Book Value						
<u>side of sheet</u>	Deduction Claimed						
2. <u>for detail</u>	Book Value						
	Deduction Claimed						
3.	Book Value						
	Deduction Claimed						
4.	Book Value						
	Deduction Claimed						
5.	Book Value						
	Deduction Claimed						
TOTALS	Book Value			15,011,780			
	Deduction Claimed			3,752,940			
	Claimed True Value			11,258,840			

Analysis of causes. This claim is based upon one or more of the following reasons as indicated by checkmark:

- (a) ☒ Inadequate depreciation or reserve has been set up on the books  
(b) ☐ Property damaged or destroyed has not been written off the books.  
(c) ☐ Property consumed or abandoned has not been written off the books.  
(d) ☒ Other causes

Following is an explanation and comparison of book amounts and claimed true value for each item under claim, with reference to supporting data. (Note: Data must be full and complete.)

- (1) Fair value is estimated as representing 75% of book value and the reduction is claimed in order that the value of the inventories may be stated at a value approximately their true value in money.  
(2) Book values include large amounts representing depreciation on plant and equipment also transportation expense which should be eliminated to arrive at true value.

TAXING DISTRICT	CREDITS	REMARKS
Current Credits Book Accounts, Notes and Other Receivables. (From Schedule 9.)	Book Value Deductions Claimed Claimed True Value	

Analysis of causes. This claim is based upon one or more of the following reasons, as indicated by checkmark:

- (a) ☐ Inadequate reserve has been set up on the books.  
(b) ☐ Bad accounts have not been written off books.  
(c) ☐ Other causes

Following is an explanation and comparison of book amounts and claimed true value for each item under claim, with reference to supporting data. (Note: Data must be full and complete.)

- (3) Book values are in excess of true value by reason of the location of our plants in relation to markets. Other steel companies have plants in or adjacent to the larger steel consuming centers into which we must ship our products. This forces us to absorb large freight differentials and should be recognized in arriving at true value in money.  
(4) Book values are in excess of true value due to the excessive costs of raw materials and the increased labor rates effective as a result of the present war conditions. The taxpayer has not changed its method of accounting to effect the "last in-first out" method of inventory accounting recognized and permitted by the Internal Revenue Code which, if followed, would result in a considerable reduction of the book values of inventories.



Detail of claim for deduction from book value of inventories-

TAXING DISTRICT	TANGIBLE PROPERTY	MANUFACTURING & MERCHANDISING INVENTORIES FROM SCH. 945C-6 & 7
Auglaize County	Book Value	3,750
St. Marys	Deduction Claimed	940
Belmont County	Book Value	1,939,320
Martins Ferry	Deduction claimed	484,830
Cuyahoga	Book Value	168,220
Cleveland	Deduction claimed	42,050
Franklin	Book value	72,320
Columbus	Deduction claimed	18,080
Hamilton	Book Value	2,030
Cincinnati	Deduction claimed	510
Hancock	Book Value	7,310
Findlay	Deduction claimed	1,830
Jefferson	Book value	4,997,270
Steubenville	Deduction claimed	1,249,310
Jefferson	Book value	3,862,330
Yorkville	Deduction claimed	965,580
Montgomery	Book value	4,350
Layton	Deduction claimed	1,090
Scioto	Book value	3,944,880
New Boston	Deduction claimed	986,220
Scioto	Book value	3,690
Portsmouth	Deduction claimed	920
Summit	Book value	5,170
Akron	Deduction claimed	1,290
Wood	Book value	1,140
Wayne	Deduction claimed	290
Totals	Book value	\$ 15,011,780
	Deduction claimed	3,752,940
	Net	\$ 11,258,840



In the Matter of the Application of THE WHEELING STEEL CORPORATION, Wheeling, West Virginia (Inter-County), for Review and Redetermination for the Year 1942

DECISION OF TAX COMMISSIONER

The application of The Wheeling Steel Corporation, Wheeling, West Virginia (Inter-County), for review and redetermination of an additional tangible personal property tax assessment against such applicant for the year 1942, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that the application here under consideration is with respect to the denial by this department of a fair value claim covering average inventory values and which claim was filed with and at the time of the tax return for the year 1942.

The Tax Commissioner, being further advised in the premises, finds that the action as heretofore taken denying such fair value claim was in every respect proper and further finds that the average values as returned for inventories located in New Boston and Steubenville taxing districts were deficient in the amounts of \$111,010.00 and \$437,900.00, respectively, and further finds that the values as originally returned for "machinery and equipment" in the 1942 tax return, which was located in New Boston, Steubenville, Yorkville and Martins Ferry taxing districts, [fol. 138] were deficient in the amounts of \$1,447,320.00, \$1,114,980.00, \$2,352,310.00 and \$26,250.00, respectively.

At the time of said hearing, it was discovered that this department had failed to assess taxable credits for the tax year 1942 in the amount of \$2,093,450.00, and as to such proposed action, the applicant contested the validity of same with respect to allocating to Ohio certain of its accounts receivable on the grounds that the provisions of Section 5328-2, General Code, are not applicable and that the construction of Section 5328-1 and Section 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the fourteenth amendment to the Constitution of the United States and the Constitution of the State of Ohio for as con-



strued, such sections operate to tax intangible property of a non-resident over which Ohio has no jurisdiction and which has no business situs in Ohio.

As to such contention the Tax Commissioner holds that he is without authority to set aside acts of the Legislature on constitutional grounds, and further, it is the position of the Tax Commissioner that the assessment as herein ordered is in every respect proper in view of the decision of the Ohio Supreme Court in the case of Ransom & Randolph vs. Evatt, 142 O. S. 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code.

In addition to the foregoing contentions, the applicant at the time of such hearing also raised the issue that the pro-[fol. 139] posed action with respect to assessing net taxable credits was illegal and improper in that the accounts receivable which this department allocated to Ohio in computing net taxable credits, did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the Tax Commissioner that the receivables as allocated to Ohio in the computation of credits did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.

It is, therefore, ordered that corrected assessment certificates issue in conformity with the foregoing, which shall be final with respect to all taxable property as originally assessed and as herein ordered to be assessed.

Department of Taxation (Signed) William S. Evatt,  
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner, with respect to the above matter.

(Signed) William S. Evatt, Tax Commissioner.

[fol. 140]. BEFORE THE BOARD OF TAX APPEALS DEPARTMENT  
OF TAXATION OF OHIO

Case No. 9681

WHEELING STEEL CORP., APPELLANT,

VS.

C. EMORY GLANDER, TAX COMMISSIONER, APPELLEE.

**Statement of Evidence**

PROCEEDINGS

Before Hon. William J. Ford and Frank F. Fleiming,  
members of the Board of Tax Appeals of the State of Ohio,  
Thursday morning, September 13, 1945.

Present: Mr. John Caren, on behalf of the Appellant.  
Mr. Daronne Tate, Asst. Atty Gen. on behalf of the Appellee.

[fol. 141]. Thursday Morning Session

September 13, 1945.

Chairman Ford: Before the Board of Tax Appeals, Department of Taxation of Ohio. Wheeling Steel Corporation, Wheeling, West Virginia, appellant, against C. Emory Glander, Appellee, Case No. 9681.

Appeal of the appellant above named was filed herein under date of January 22, 1945, from a final order of the Tax Commissioner under date of December 26, 1944, denying an application for review and determination with respect to the previous order of the Tax Commissioner denying the claim for deduction from book value of machinery and equipment and of inventories of the appellant for the tax year 1942, in and by which order the Tax Commissioner, under date of December 26, 1944, an assessment was made against the appellant on and with respect to its notes or accounts receivable as taxable credits in the amount of \$2,093,450.00, (two million, ninety-three thousand, four hundred and fifty dollars).

By the assignment of error set out in Appellant's notice of Appeal, the only question then before the Board of Tax Appeals is that with respect to the right of the Tax Commissioner to assess an ad valorem property tax against



said credits as intangible property, which the appellant claims were without the territorial jurisdiction of the State of Ohio and which the Appellant further claims the State of Ohio had no authority to tax under the law of [fol. 142] Ohio and the 14th Amendment of the Constitution of the United States.

Pursuant to assignment this case was called for hearing before William J. Ford and Frank F. Fleming, members of the Board of Tax Appeals on September 13, 1945, at which time, by agreement of counsel on both sides the case was submitted to the Board on a stipulation of facts in the case, to be filed with the Board on or before September 24th, with the understanding that if the case was not submitted on said stipulation within such time the case should be immediately set down for hearing on the evidence of the case to be otherwise developed.

And the foregoing was all the evidence offered, introduced and admitted on behalf of the appellant on this Hearing of this matter.

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[fol. 143] DEPARTMENT OF TAXATION OF OHIO BOARD OF TAX  
APPEALS

[Title omitted]

STIPULATION OF FACTS

It is stipulated and agreed by and between counsel for the respective parties hereto that the statements hereinafter contained are true and may be considered as proved; subject, however, to the right of each of the parties to object to the reception in evidence of any one or more of said statements herein contained on the ground of the relevancy or the materiality thereof.

At all times mentioned herein:

1. The appellant, Wheeling Steel Corporation, was a corporation organized and existing under and by virtue of the laws of the State of Delaware. Appellant maintained an office in Delaware through the Corporation Service Company, a corporation, at which were kept a duplicate stock ledger and records of all transactions with reference to appellant's capital stock. Appellant did not have any individual office in the State of Delaware.

[fol. 144] 2. Appellant's business was the manufacture and sale of steel and steel products. Its general business offices, hereinafter referred to as the Wheeling office, were located in Wheeling, West Virginia, in a twelve-story office building owned by appellant, approximately 63% of the floor space of which was utilized by appellant for offices for its officers, executives and other employees.

3. The Chairman of the Board, President, all Vice-Presidents, Treasurer, Secretary and Comptroller of appellant had their offices at the Wheeling office. All meetings of stockholders, directors and the executive committee were held at the Wheeling office and dividends, when declared, were ordered to be paid and distributed at meetings held at the Wheeling office.

4. All of appellant's general books and general accounting records were kept at the Wheeling office. The accounting department (including therein the accounts payable, cost accounting, accounts receivable, inventory accounting, invoicing and plant and property divisions), advertising department, centralized employment department, claim department, credit and collection department, legal department (excluding the General Counsel, a firm of attorneys having offices in Wheeling but not in the office building owned by appellant), operating department (including therein the marine, labor relations and research divisions), order department, payroll salary and auditing department, purchasing department, real estate department, sales [fol. 145] department, stock transfer department, traffic department and treasury department were located at the Wheeling office.

Management and supervision of the accounting department were exercised by the Comptroller by authority of the By-laws of appellant then in full force and effect which provided, in Article V, Section 15, that "The Comptroller shall be responsible for the keeping of correct records of the business, assets, liabilities, and transactions of the Corporation and of all subsidiary corporations, and shall see that audits thereof are currently and regularly made by independent accountants."

The credit and collection department had the duty of investigating the credit of, and was responsible for terms of credit extended to, all customers, and supervised and was



responsible for the collection of all accounts receivable, notes, bills, trade acceptances, etc.

5. Custody of all money, securities, notes and valuable effects of appellant was exercised by the Treasurer.

6. Appellant operated eight manufacturing plants which were situated in the following places:

Wheeling, West Virginia; Steubenville, Ohio;  
Benwood, West Virginia; Yorkville, Ohio;  
Follansbee, West Virginia; Martins Ferry, Ohio;  
Beech Bottom, West Virginia; Portsmouth, Ohio.

7. Appellant maintained sales offices in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San Francisco, California; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, [fol. 146] Missouri; Seattle, Washington, and New York City, at which orders for appellant's products were solicited and received subject to acceptance by the Wheeling office.

8. Appellant filed an inter-county consolidated personal property tax return for 1942 with the department of taxation. Said tax return included a consolidated balance sheet (Form 911) of appellant's and some of its wholly owned subsidiaries' assets and liabilities as of January 1, 1942, showing, among other assets, accounts and notes receivable due within one year from the date of creation, deposits in Ohio banks and prepaid insurance, of which only the item of "deposits in Ohio banks" was shown on said balance sheet as having a situs in Ohio.

9. As the result of an examination of appellant's books at the Wheeling office, appellee determined that, as of the beginning of the first day of January, 1942, appellant and all of its subsidiaries owned credits taxable in Ohio (in addition to "deposits in Ohio banks") in the amount of \$2,093,450 and, with respect to such credits, assessed against appellant a tax of \$6280.35.

10. In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of \$5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and ac-

counts receivable resulted from the sale of products shipped [fol. 147] from appellant's Ohio manufacturing plants; that \$225,328 in prepaid insurance had arisen out of business transacted in Ohio inasmuch as it represented prepaid premiums for insurance on appellant's Ohio manufacturing plants. The total of the credits so determined to have arisen out of business transacted by appellant in Ohio was \$5,475,853 and was 47.623% of all of appellant's and its subsidiaries' notes, accounts receivable and prepaid items which amounted to \$11,498,424 on tax-listing day in 1942. Appellee then computed said assessment by deducting \$7,102,340, the total of appellant's and its subsidiaries' accounts payable, from \$11,498,424, the total of the notes and accounts receivable and prepaid items, and assessing 47.623% of the remainder, to-wit, \$2,093,450, as credits taxable in Ohio. A copy of the computation made by appellee in arriving at the assessment is attached hereto, made a part hereof and marked Exhibit A.

11. Products shipped from appellant's Ohio manufacturing plants to fill the orders from which resulted the greater part, in dollar value, of the notes and accounts receivable owned by appellant and its subsidiaries on tax-listing day in 1942 were manufactured at said plants after receipt of, and to fill specific orders therefor and had not been manufactured prior to the receipt of orders and kept on hand to fill orders. A smaller part, in dollar value, of said notes and accounts receivable resulted from sales of products which had been manufactured prior to the receipt of orders [fol. 148] therefor and kept on hand at said plants to fill any orders therefor that appellant might receive.

12. Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax listing day in 1942 resulting either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. A specimen of the form of order



blank used for all sales from which the accounts receivable in question resulted is attached hereto, and made a part hereof and marked Exhibit B.

13. All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellants's business, whether in Ohio or elsewhere. The sales offices had no powers or [fol. 149] duties with respect to the creation, custody, collection or extinguishment of said notes.

14. All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avails of said accounts receivable were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of said accounts receivable were kept at the sales offices which had no powers or duties with respect to the collection thereof.

15. All of said notes and accounts receivable arose in the ordinary course of appellant's business of making sales of its products.

16. Payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants. Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose. All commercial and other accounts payable were paid by checks signed at and issued at the Wheeling office.

17. All policies of insurance against loss or liability purchased by appellant were negotiated at the Wheeling office, where they were delivered, paid for and kept. Such policies were blanket policies covering properties and potential [fol. 150] risks in West Virginia, Ohio and other states.

18. All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property

taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942.

19. The transcript of the proceedings heretofore had before the Tax Commissioner of Ohio in this matter prior to the taking of the within appeal is incorporated herein by reference and made a part hereof..

C. Emory Glander, Tax Commissioner, by Daronne R. Tate, Assistant Attorney General of Ohio.  
Wheeling Steel Corporation, by Dargusch, Caren, Greek & King, Its Attorneys.



[fol. 151]

EXHIBIT "A" TO STIPULATION OF FACTS  
WHEELING STEEL CORPORATION

Revised Sch. 9—per Ransom & Randolph

1942 Return	In Ohio	Out of Ohio	Total	
Accounts & Notes Receivable	5,250,525		10,817,361	
Deferred—Taxable Prepaid	225,328		449,717	
Advances—Other Cos. not controlled or consolidated			74,063	
Due—Employees Stock Subs.			157,283	
	5,475,853			11,498,424
Accounts Payable	5,205,540			
Less Tax withheld fr. employees for O.A.B.				
Unemployment	96,481		5,109,059	
Accrued Interest			353,500	
Accrued Royalties			56,046	
Reserve for Bad Debts			383,935	
*Serial Notes to Banks due 1 yr. fr. date of inception			1,200,000	
				7,102,540
Taxable Credits			4,395,884	
Ohio Credits (47.623%)			2,093,452	
			@ .003	6,280.35
Ohio Receivables Prepaid	5,475,853			
	+ 47.623% Ohio			
Total Receivables Prepaid	11,498,424			

\* Date of inception 3/19/41—Payable \$100,000 per mo. \$1,200,000 at 3/19/42 first payment made.

Killam 12/14/44

(Here follow 2 Photolithographs, side folios 152, 153)







## CONDITIONS OF SALE

For (a) Tubular Goods (b) Sheets and Plates (c) Tin Plate, Terne Plate and Black Plate of Tin Mill Sizes (d) Tie Plates, Sheet Bars and Skelp (e) Wire Products (f) Nails (g) Steel Barrels, Drums and Steel Range Boilers.

Orders are subject to acceptance by Seller's Home Office.

If Transportation charges or Taxes are prepaid, the total charges are to be paid by the buyer on presentation, in cash.

If a freight allowance shall be included in this quotation, and if a different rate exists at time shipment is made, then both price and allowance shall be increased or decreased by the difference between the freight allowance herein and the actual freight at time of shipment.

All payments to be made in New York exchange or its equivalent.

Any discount allowed by Seller shall apply only to the invoiced value of the products and not to any part of the transportation charges on such products.

Interest will be charged at the rate of 6% per annum from maturity of invoice until paid.

If the Buyer fails to fulfill the terms of payment under this or any other order between the Buyer and the Seller, the Seller may defer further shipments until such payments are made, or may, at its option cancel this order. The Seller reserves the right to require from the Buyer cash or satisfactory security for performance of the Buyer's obligations, and refusal to furnish such cash or security will entitle the Seller to suspend shipments until such cash or security is furnished, and, at its option, to cancel the order, reserving any and all rights to damages caused by Buyer's breach of this contract.

Railroad permits as and when required are to be obtained by buyer. Seller reserves the right of routing, unless otherwise arranged.

If the order specifies sheets and plates the standard for gauges and weights of hot rolled sheets shall be that adopted by the United States Government, July 1, 1893, for Iron (Steel is about 2% heavier than Iron.) The allowable variation for No. 17 Gauge and lighter shall be 2½% over or under; and for No. 16 Gauge and heavier, including No. 8 Gauge, 5% over or under. Plates 3/16 and heavier—the tolerances provided in Manufacturers' Standard Specifications adopted by the Association of American Steel Manufacturers shall apply.

If the order specifies tin plate, terne plate or black plate of tin mill sizes the standard for gauges and weights of hot rolled sheets shall be that adopted by the United States Government, July 1, 1893, for Iron (Steel is about 2% heavier than Iron.) The allowable variation for No. 17 Gauge and lighter shall be 2½% over or under, and No. 16 Gauge and heavier, 5% over or under.

66B

The Seller shall not be liable for non-performance, or delay in performance or for consequential damages which may arise, if such failure to perform is the result of fires, strikes, floods, differences with employees, casualties, delays in transportation, shortage of cars, embargoes, accidents, acts demands or requests of the United States Government, or other causes beyond Seller's reasonable control. Unless otherwise mutually agreed, within a reasonable time after the removal of any such contingencies, seller is to complete deliveries as rapidly as possible.

All sales are firm and not subject to cancellation or revision of prices except by and with the consent of Seller. Insistence upon cancellation or of suspension of manufacture or of shipment, or failure to furnish specifications when required, may be treated as a breach of contract, and the Buyer shall immediately be liable for all damages arising.

All inspection whether for surface, or physical, or chemical requirements when applicable, if and as agreed to at time of sale, must be made at Seller's works before shipment.

All claims for shortages and defective goods must be made within fifteen days after receipt of materials. Claims for defective materials shall, in no event, include allowance for labor on such material or consequential damages. Material must not be returned without Seller's permission. Material found defective will be replaced.

Every piece of Pipe, Tubing, Casing, Line Pipe, etc., is carefully tested but as it is impossible to always detect imperfection, the only guarantee that is given, is to replace such goods as prove defective. Under no circumstances is Seller responsible for any damages beyond the price of the goods. No charges for labor or expenses required to repair defective goods or occasioned by them will be allowed. If the goods are defective, the measure of damages is the price of the defective pieces.

The permissible variation in weight of all Tubular Goods is five per cent above and five per cent below the Seller's published weights for such goods except in the case of Double Extra Strong Pipe where the permissible variation in weight is ten per cent above and ten per cent below.

Extra Strong and Double Extra Strong Pipe are always furnished in random lengths with plain ends, unless otherwise ordered.

All other Tubular Goods are always furnished in random lengths with threads and couplings, unless otherwise ordered.

Any tax or other Governmental charge imposed by Federal, State, or Municipal Authorities upon production, sale and/or shipment of the articles covered hereby, may at Seller's option, be added to the amount to be paid hereunder.

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[fol. 154] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT  
OF TAXATION OF OHIO

No. 9681

WHEELING STEEL CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee

DECISION—April 7, 1947

This cause came on for hearing upon an appeal from the final order of the Tax Commissioner denying an application for review and redetermination with respect to an assessment made by him against the appellant on its taxable credits consisting of notes or accounts receivable and prepaid items, which assessment amounted to \$6,280.35. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, the stipulation of facts and briefs of counsel.

From the stipulation of facts it appears that appellant is a Delaware corporation, in which state it maintained a statutory office. Its principal office and place of business were located in Wheeling, West Virginia, where all the officers had their offices, where all meetings of shareholders, directors and the executive committee were held and where all dividends were declared. All of appellant's general books and accounting records were kept at the Wheeling [fol. 155] office. All credit was granted and collections of accounts and notes receivable, etc. were made there. Appellant operated four manufacturing plants in West Virginia and four in Ohio. It maintained sales offices in twelve states, one of which offices was located in Cincinnati, Ohio.

The stipulation also contains the following:

"Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax listing day in 1942 resulted either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when



so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. \* \* \*

"All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. The sales offices had no powers or duties with respect to the creation, custody, collection or extinguishment of said notes.

"All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avials of said accounts receivable were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of said accounts re-[fol. 156] ceivable were kept at the sales offices which had no powers or duties with respect to the collection thereof.

"All of said notes and accounts receivable arose in the ordinary course of appellant's business of making sales of its products.

"Payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants. Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose. All commercial and other accounts payable were paid by checks signed at and issued at the Wheeling office.

"All policies of insurance against loss or liability purchased by appellant were negotiated at the Wheeling office, where they were delivered, paid for and kept. Such policies were blanket policies covering properties and potential risks in West Virginia, Ohio and other states.

"All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942."

In its consolidated inter-county return appellant allocated all of its accounts receivable and prepaid items outside of Ohio. The tax commissioner, on the other hand, determined that certain of the credits owned by appellant and its subsidiaries had their situs in Ohio and that the amount thereof which was therefore, taxable in this state was \$2,093,450. making an assessment thereon of \$6,280.35, which is the subject of this appeal. The amount of such credits was arrived at as follows:

[fol. 157] "In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of \$5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and accounts receivable resulted from the sale of products shipped from appellant's Ohio manufacturing plants; that \$225,328 in prepaid insurance had arisen out of business transacted in Ohio inasmuch as it represented prepaid premiums for insurance on appellant's Ohio manufacturing plants. The total of the credits so determined to have arisen out of business transacted by appellant in Ohio was \$5,475,853 and was 47.623% of all of appellant's and its subsidiaries' notes, accounts receivable and prepaid items which amounted to \$11,498,424 on tax-listing day in 1942. Appellee then computed said assessment by deducting \$7,102,540, the total of appellant's and its subsidiaries' accounts payable, from \$11,498,424, the total of the notes and accounts receivable and prepaid items, and assessing 47.623% of the remainder, to-wit, \$2,093,450, as credits taxable in Ohio."

One question presented is whether the tax commissioner erred in allocating to Ohio the accounts receivable which arose from sales of goods which were shipped from its plants in this State. In determining this question the Board is bound to follow the statutes applicable thereto,



as construed by the Supreme Court. Section 5328-1, General Code, provides in part as follows:

“Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock [fol. 158] of financial institutions and dealers in intangibles located in this state shall be subject to taxation;”

It is clear that under this statute intangibles owned by a nonresident cannot be taxed unless they are both used in business in this State and arise out of business transacted here. Section 5325-1, General Code, reads in part as follows:

“Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be ‘used’ when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. ‘Business’ includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.”

Since the avails of these accounts receivable were applied to the conduct of appellant’s business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. *Ransom & Randolph Co. v. Evatt*, 142 O. S. 398, 27 O. O. 348, 37 O. L. A. 481, 10 O. Supp. 25, 52 N. E. (2d) 738; *Haverfield Company v. Evatt*, 143 O. S. 58, 28 O. O. 16, 54 N. E. (2d) 149.

We come now to section 5328-2, General Code, which provides, with reference to the situs of accounts receivable, as follows:

“Property of the kinds and classes herein mentioned, when used in business shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

“In the case of accounts receivable, when resulting [fol. 159] from the sale of property sold by an agent

having an office in such other state or from a stock of good maintained therein, or from services performed by an officer, agent or employe connected with, sent from or reporting to any officer or at any office located in such other state. • • •”

Said section also provides that:

“The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances.”

This reciprocal provision indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this Board has no right to declare a statute unconstitutional. *Hillsborough Township v. Cromwell*, 90 L. Ed. 298; *Schwartz v. Essex* [fol. 160] *County Board of Taxation*, 129 N. J. L., 129 affirmed 130 N. J. L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court. In the case of *National Cash Register Company v. Evatt*, 145 O. S., 597, 31 O. O., 218, 42 O. L. A., 545, 15 O. Supp. 144, 62 N. E. (2d), 327, the Court held that accounts receivable of the company, a Maryland corporation, which arose from sales made outside of Ohio of goods filled by



shipment from its manufacturing plant in Ohio, were taxable in this state. The Court said:

“We direct our attention first to the question whether the accounts receivable, arising from sales outside Ohio and filled from a stock of goods in Ohio, have an Ohio situs for purpose of taxation.”

In referring to section 5328-2, General Code, the Court said:

“Applying that section to the facts in the instant case, it means that accounts receivable belonging to a Maryland corporation, when resulting from sales of property by an agent having an office in Ohio or *from a stock of goods maintained in Ohio*, shall be considered to arise out of business transacted in Ohio.”

It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a [fol. 161] stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The Board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118, decided by this Board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the Board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

For the foregoing reasons the Board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, there-

fore, arose out of business transacted in this State and consequently, are taxable here.

No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this State. As to this, section 5328-2, General Code, provides that prepaid items [fol. 162] when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The Board finds that these prepaid items relate to property used in appellant's business in this State and, in view of the above statutory provisions, arose out of business transacted in this State and are, therefore, taxable.

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

Edward J. Kirwin, Secretary.

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[fol. 163] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 164] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD  
—Filed December 6, 1948

Appellant, Wheeling Steel Corporation, adopts its assignments of error as its statement of the points to be relied upon, and says that the whole of the record, as filed, is necessary for the consideration of the case.

Wheeling Steel Corporation, by ————, John Caren, Its Attorneys.

### Proof of Service

Receipt of a true copy of the above statement and designation is hereby acknowledged this 4th. day of December, 1948.

C. Emory Glander, Tax Commissioner of Ohio.

[fol. 164a] [File endorsement omitted.]

[fol. 165] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 3, 1949

The statement of Jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 53,449, Ohio, Supreme Court. Term No. 447. Wheeling Steel Corporation, Appellant, vs. C. Emory Glander, Tax Commissioner of Ohio. Filed December 6, 1948. Term No. 447 O.T. 1948.

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SUPREME COURT, U.S.

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 448

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NATIONAL DISTILLERS PRODUCTS CORPORATION,  
NEW YORK, APPELLANT,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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FILED DECEMBER 6, 1948.



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 448

NATIONAL DISTILLERS PRODUCTS CORPORATION,  
NEW YORK, APPELLANT,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] [File endorsement omitted]

[fol. 2] **IN THE SUPREME COURT OF OHIO**

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION, New York,  
New York, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner, State of Ohio,  
Appellee

PETITION FOR APPEAL FROM THE SUPREME COURT OF OHIO—  
Filed October 29, 1948

To the Honorable Carl V. Weygandt, Chief Justice of the  
Supreme Court of Ohio:

Now comes National Distillers Products Corporation, the above named appellant, by its Attorney, Isadore Topper, and complains and allèges that it is a corporation duly organized and existing under the laws of the State of Virginia, having its principal office and place of business in the City and State of New York; that it is qualified to do business as a foreign corporation in the State of Ohio; that in the above entitled matter on the 4th day of August, 1948, an opinion and decision ruling against appellant was rendered by the Supreme Court of the State of Ohio, which opinion and decision became a final judgment of the Supreme Court of Ohio on the 6th day of October, 1948, upon the overruling by said Court of the application of appellant for a rehearing; that said opinion, decision and final judgment was [fol. 3] made and rendered by the highest court in the State of Ohio; and that in said opinion, decision and final judgment, it was adjudged that Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as applied by the Tax Commissioner of Ohio, assessing personal property taxes upon intangible personal property of appellant, to-wit, accounts receivable arising out of sales made, approved and completed in other states of goods manufactured in and shipped from the plant of appellant in Ohio, are not in conflict with the provisions of Section 8 of Article I of the Constitution of the United States nor in conflict with the Fourteenth

Amendment to the Constitution of the United States; and that it was further adjudged that the application of said statutes by the Tax Commissioner of Ohio did not deprive your petitioner of the rights, privileges or immunities secured to the citizens and corporations of the United States and the State of Ohio, nor did said application of said statutes deprive appellant of property without due process of law, nor did such application of said statutes deprive appellant of the equal protection of the law; and that it was further adjudged that said statutes as applied by the Tax Commissioner did not constitute a burden on interstate commerce.

Appellant has filed with this petition with the Clerk of said Supreme Court of the State of Ohio, an Assignment of Errors setting out separately and particularly each error asserted by it, and also presents herewith a separate statement particularly disclosing the basis upon which it is [fols. 4-44] contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Wherefore, your petitioner prays the allowance of an appeal from said judgment of the Supreme Court of the State of Ohio to the Supreme Court of the United States, to the end that the record in said matter may be removed into the said Supreme Court of the United States and the errors complained of by your petition may be examined and corrected and said judgment reversed, and a judgment rendered in favor of the appellant and for costs.

National Distillers Products Corporation, Appellant,  
by Isadore Topper, Its Attorney.

[fol. 45] [File endorsement omitted.]



[fol. 46] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 29, 1948

National Distillers Products Corporation, appellant herein, assigns the following errors in the record and proceedings of this case:

(1) *Unconstitutional Burden on Interstate Commerce*

The Supreme Court of the State of Ohio erred in holding and deciding that the determination, finding, assessment and order of the Department of Taxation of the State of Ohio, as made and entered by the Tax Commissioner of the State of Ohio and affirmed by the Board of Tax Appeals of the State of Ohio against appellant, a Virginia corporation, with its principal commercial and business office in New York City, that the accounts receivable of the appellant, a foreign corporation, arising out of sales made and completed in other states by its agents and employees in other states from goods manufactured in and shipped from Ohio on instructions from its principal business office in another state, and which accounts receivable are payable outside of Ohio, and on payments thereon deposited in banks in other [fol. 47] states, had a tax situs in Ohio and were allocable to Ohio for the purpose of taxation, did not constitute an unconstitutional burden on interstate commerce within the meaning of Section 8 of Article I of the Constitution of the United States, and that the provisions of Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as so interpreted and applied by the Tax Commissioner of Ohio and the Board of Tax Appeals of the State of Ohio were not contrary to nor in violation of Section 8 of Article I of the Constitution of the United States.

(2) *Denial of Due Process of Law*

The Supreme Court of Ohio erred in holding and deciding that said determination, finding, assessment and order of the Department of Taxation of the State of Ohio, as made and entered by the Tax Commissioner of Ohio and affirmed by the Board of Tax Appeals of the State of Ohio against appellant herein did not constitute a denial of due process of law to appellant herein, in that such taxation of such

accounts receivable did not constitute a taking of said property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States, and that the provisions of Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as so interpreted and applied by the Tax Commissioner of Ohio and the Board of Tax Appeals of the State of Ohio were not contrary to nor in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[fols. 48-49] (3) *Denial of Equal Protection of Law*

The Supreme Court of Ohio erred in holding and deciding that said determination, finding, assessment and order of the Department of Taxation of the State of Ohio, as made and entered by the Tax Commissioner of Ohio and affirmed by the Board of Tax Appeals of the State of Ohio against appellant herein, did not constitute a denial to appellant of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States and that the provisions of Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as so interpreted and applied by the Tax Commissioner of Ohio were not contrary to nor in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, National Distillers Products Corporation, appellant herein, for said errors prays that the said judgment of the Supreme Court of the State of Ohio, rendered October 6, 1948, upon the opinion and decision of said court dated August 4, 1948, be reversed and that the judgment be rendered in favor of the appellant herein, and for costs.

National Distillers Products Corporation, Appellant,  
by Isadore Topper, Its Attorney.

[fol. 50] [File endorsement omitted.]



[fol. 51]

## IN THE SUPREME COURT OF OHIO

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION, New York,  
New York, Appellant,

vs.

C. EMOBY GLANDER, Tax Commissioner, State of Ohio,  
Appellee

## ORDER ALLOWING APPEAL—Filed November 2, 1948

The appellant in the above entitled case having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled case by the Supreme Court of Ohio on the 6th day of October, 1948, upon the opinion and decision of said Supreme Court of Ohio of August 4, 1948, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Errors, Prayer for Reversal and Statement of Jurisdiction pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same ~~is~~ hereby, allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled case, as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Clerk of the Supreme Court of the United States so that he shall have the same in said Court within forty days from the date [fols. 52-54] hereof.

And it is further ordered that security for costs on appeal be fixed at the sum of \$500.00, and that upon approval of bond in said amount this order shall operate as a superse-deas.

Dated at Columbus, Ohio this 30 day of October, 1948.

Carl V. Weygandt, Chief Justice of the Supreme  
Court of Ohio.

[fols. 55-56] Citation in usual form, filed Nov. 2, 1948,  
omitted in printing.

[fols. 57-63] [File endorsement omitted.]

[fol. 64]

## IN THE SUPREME COURT OF OHIO

[Title omitted]

PRECIPUE FOR TRANSCRIPT OF RECORD—Filed November 2, 1948

To the Clerk of the Supreme Court of Ohio:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal in the above styled cause, and to include in said transcript of record the following papers and documents, to-wit:

(1) The transcript of the record on appeal from the Board of Tax Appeals to the Supreme Court of Ohio in its entirety;

(2) Opinion and Entry of the Board of Tax Appeals in this cause filed March 12, 1947;

(3) Notice of Appeal to the Supreme Court of Ohio from the Board of Tax Appeals decision in this cause filed by appellant herein;

(4) Assignments of error filed by appellant in the Supreme Court of Ohio from decision and order of the Board of Tax Appeals in this cause;

[fol. 65] (5) Opinion and decision of the Supreme Court of Ohio rendered in this cause on August 4, 1948;

(6) Application for rehearing filed by appellant herein in the Supreme Court of Ohio on August 16, 1948;

(7) Order of the Supreme Court of Ohio denying said application for rehearing, entered October 6, 1948;

(8) Petition for appeal to the Supreme Court of the United States filed by appellant herein;

(9) Assignments of error with respect to the decision and judgment of the Supreme Court of Ohio in this cause, filed by appellant herein;

(10) Order of the Supreme Court of Ohio allowing appeal;

(11) Citation on appeal to C. Emory Glander, Tax Commissioner of the State of Ohio, signed by the Chief Justice of the Supreme Court of Ohio;

(12) Certificate as to federal question involved signed by the Chief Justice of the Supreme Court of Ohio;

(13) The bond for costs of appeal and approval thereof;

(14) This precipe with acknowledgment and waiver of counter precipe.



7

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 9th day of December, 1948.

Isadore Topper, Attorney for Appellant.

[fols. 66-67] Service of the foregoing precipe upon the undersigned is hereby acknowledged and right of filing counter precipe is hereby waived, this 2nd day of November, 1948.

C. Emory Glander, Tax Commissioner, by Hugh S. Jenkins, Attorney General of Ohio, by Aubrey A. Wendt, Asst. Atty. General, Attorneys for Appellee.

[fol. 68] [File endorsement omitted.]

[fol. 69] IN THE SUPREME COURT OF OHIO

[Title omitted]

SUPPLEMENTAL PRECIPE—Filed November 2, 1948

To the Clerk of the Supreme Court of Ohio:

You are hereby requested to include in the transcript of record heretofore called for by Precipe for Transcript of Record filed herein, which transcript is to be filed in the Supreme Court of the United States, the following additional documents, to-wit:

- (1) Stipulation of Facts filed with the Board of Tax Appeals of Ohio in this cause and notice to appellee of allowance of appeal;
- (2) Printed record in this cause in its entirety;
- (3) This precipe, with acknowledgment and waiver of counter precipe.

Said foregoing documents to be prepared as required by law and filed as a part of the transcript of the record herein in the office of the Clerk of the Supreme Court of the United States on or before the 9th day of December, 1948.

Isadore Topper, Attorney for Appellant.

[fols. 70-72] Service of the foregoing supplemental precept upon the undersigned is hereby acknowledged and right of filing counter precept is hereby waived, this 2d day of November, 1948.

Aubrey A. Wendt, Assistant Attorney General of Ohio for C. Emory Glander, Tax Commissioner of Ohio.

[fol. 73] IN THE SUPREME COURT OF OHIO

[Title omitted]

CERTIFICATE AS TO FEDERAL QUESTION INVOLVED

It is certified that the above entitled cause came on for hearing in the Supreme Court of Ohio upon the record of proceedings, the stipulation of facts, and the briefs and arguments of counsel, and that at each stage of the proceedings in this case substantial federal questions were raised by and argued and urged by appellant, to-wit: (1) That Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as said sections have been applied by the Tax Commissioner of Ohio in this case, are contrary to and in violation of Section 8 of Article I of the Constitution of the United States; (2) That said Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as applied in this case by the Tax Commissioner of Ohio, are contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Such questions were raised by appellant in its application for review and redetermination of the assessment of the Tax Commissioner (R. 2, 3), in its petition on appeal filed [fols. 74-75] with the Board of Tax Appeals of Ohio on January 16, 1946 (R. 8) and in its assignments of error and brief filed with the Supreme Court of Ohio.

With respect to such substantial federal questions, the Tax Commissioner of Ohio found and determined that he did not have authority to set aside acts of the legislature on constitutional grounds and the Board of Tax Appeals found that it was without authority to consider and determine questions of constitutionality of statutes of the State of Ohio. Further, with respect to substantial federal constitutional questions, the Supreme Court of Ohio held



that said Sections 5325-1, 5328-1 and 5328-2 as applied by the Tax Commissioner of the State of Ohio in this case were not contrary to nor in violation of Section 8 of Article I of the Constitution of the United States nor contrary to nor in violation of the Fourteenth Amendment to the Constitution of the United States.

Witness the Honorable Supreme Court of Ohio this 30 day of October, 1948.

Supreme Court of Ohio, By Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 76-78] Bond on appeal for \$500.00, approved and filed Nov. 5, 1948, omitted in printing.

[fol. 79] IN THE SUPREME COURT OF OHIO, JANUARY TERM 1947

31037

Title of Case: NATIONAL DISTILLERS PRODUCTS CORPORATION, NEW YORK, NEW YORK, Appellant

vs.

EMORY GLANDER, Tax Commissioner, State of Ohio, Appellee

Attorneys: Isadore Topper, 306 Huntington Bl. Bldg., Columbus 15, Ohio.

Hugh S. Jenkins, Daronne R. Tate, Columbus, Ohio.

Action: Appeal from the Board of Tax Appeals #11118.

MEMORANDA OF PLEADINGS, &c., FILED, WRITS ISSUED, &c.  
 Apr. 2, 1947. Notice of Appeal & proof of service filed.  
 Apr. 18, 1947. Transcript of record & abstract of docket of Board of Tax Appeals filed.  
 Apr. 18, 1947. Cause docketed.  
 Apr. 18, 1947. Papers taken by Rodenfels. 5/21/47 returned.  
 Apr. 28, 1947. Appellant's printed brief & proof of service filed.

May 16, 1947 Entry extending time for filing printed record to June 2, 1947. Carl V. Weygandt, C. J. J. 38-384.

June 3, 1947 Entry extending time for filing printed record herein to June 12, 1947. Carl V. Weygandt, C. J. J. 38-395.

June 4, 1947 Application of Squire, Sanders & Dempsey for leave to file brief Amicus Curiae herein filed.

June 4, 1947 Entry granting Squire, Sanders & Dempsey leave to file brief Amicus Curiae on or before June 25, 1947. Carl V. Weygandt, C. J. J. 38-401.

[fol. 80] June 6, 1947. Printed record filed. 6/9/47 P. S. filed.

June 12, 1947. Printers receipted bill filed.

June 26, 1947. Printed brief Amicus Curiae of Squire, Sanders & Dempsey / same as 31079, 31081 / filed. 7/5/47 P. S. filed. acknowledgement of service filed 7/10/47.

Oct. 3, 1947. Leave to file Appellee's brief instanter filed.

Oct. 3, 1947. Appellee's printed brief & A of S filed. 10/6/47 P. S. filed.

Aug. 4, 1948. Decision affirmed. J. 38-684.

Aug. 7, 1948. Notification received of application for rehearing to be filed.

Aug. 16, 1948. Application for rehearing & proof of service filed.

Oct. 6, 1948. Rehearing denied. J. 39-2.

Oct. 29, 1948. Petition for appeal to United States Supreme Court filed.

Oct. 29, 1948. Statement in support of jurisdiction filed.

Oct. 29, 1948 Assignments of error filed.

Nov. 2, 1948. Order allowing appeal filed.

Nov. 2, 1948. Citation filed.

Nov. 2, 1948. Proof of service of all papers filed.

Nov. 2, 1948. Certificate as to Federal Question involved filed.

Nov. 2, 1948. Precipe for transcript of record filed.

Nov. 2, 1948. Supplemental precipe for transcript filed.

Nov. 3, 1948. Notice to appellee filed.

[fol. 81]

#### JOURNAL ENTRIES

31037. Friday May 16, 1947. Entry. Upon application of appellant and for good cause shown, it is ordered that the time for filing printed record herein be, and the same hereby



is, extended, to June 2, 1947. Carl V. Weygandt, C. J. J. 38, Page 384.

31037. Monday, June 2, 1947. Entry. Upon application of appellant, and for good cause shown, it is ordered that the time for filing printed record herein be, and the same hereby is, extended to June 12, 1947. Carl V. Weygandt, C. J. J. 38, Page 395.

31037. Wednesday, June 4, 1947. Entry. Upon application and for good cause shown, it is ordered that Squire, Sanders & Dempsey are hereby given leave to file brief amicus curiae herein on behalf of appellant on or before June 25, 1947. Carl V. Weygandt, C. J. J. 38, Page 401.

#### JUDGMENT.

31037. Wednesday, August 4, 1948. Appeal from the Board of Tax Appeals: This cause came on to be heard upon the transcript of the record of the Board of Tax Appeals of Ohio and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed for the reasons stated in the opinion rendered herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals of Ohio, to carry this judgment into Execution. J. 38, Page 684.

#### ORDER DENYING REHEARING

31037. Wednesday, October 6, 1948. Rehearing Docket. [fol. 82] Upon consideration of the application for rehearing herein, it is ordered by the Court that rehearing be, and the same hereby is, denied. J. 39, Page 2.

[fol. 83] IN THE SUPREME COURT OF OHIO

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION, NEW YORK,  
New York, Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner, State of Ohio,  
Appellee.NOTICE OF APPEAL FROM FINDING, ORDER AND DECISION OF THE  
BOARD OF TAX APPEALS OF THE STATE OF OHIO—Filed April  
2, 1947

The appellant, National Distillers Products Corporation, hereby gives notice that it is appealing from the Board of Tax Appeals to the Supreme Court of Ohio, a finding, order and decision made by the Board of Tax Appeals of the Department of Taxation of the State of Ohio, in cause number 11118 on the docket of said Board of Tax Appeals on the 12th day of March, 1947, and which finding, order and decision made by the Board of Tax Appeals in the aforesaid cause, reads as follows:

“Before the Board of Tax Appeals, Department of Taxation of Ohio

No. 11118

NATIONAL DISTILLERS PRODUCTS CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee.

## ENTRY

This cause and matter came on for consideration by [fol. 84] the Board of Tax Appeals upon an appeal filed herein by the appellant, above named, from a final order of the tax commissioner denying an application theretofore filed by the appellant for the review and correction of an additional intangible personal property tax assessment in the amount of \$8,990.01 made against it for the tax year 1944. The case was heard and submitted to the Board upon said appeal, on a transcript of the proceedings before the



tax commissioner relating to the additional tax assessment made against it, upon a stipulation of the facts in the case and on the briefs and arguments of counsel.

It appears from the facts thus presented that appellant is a corporation organized and existing under the laws of the State of Virginia where its stockholders' meetings are held. The principal business of the corporation is in the city of New York where all of its executive offices are located; and all of its business activities are governed and controlled from its offices in New York. All of its accounts payable were paid from funds on deposit in New York. The corporation has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton County, Ohio; and it sells its products in every state where such products may be legally sold. Pay roll checks for employes of these several plants and checks for federal excise taxes due from said plants, including the one located at Carthage, Ohio, were paid with funds on deposit in banks in these several localities where such plants are located. These funds were obtained through checks drawn at the office of the corporation in New York on banks in said city. All accounts receivable were posted in the books of the corporation in the City of New York where such accounts were payable and where all of its receipts were deposited.

The accounts receivable here in question, the allocation of which resulted in the additional intangible property tax assessment complained of, arose from the sale of products manufactured by the corporation at its plant in Carthage, Ohio, which products were shipped from a stock of goods maintained by the corporation at its Carthage, Ohio plant to points in the State of Ohio and elsewhere throughout the United States. All orders for the sale of these products were solicited by agents outside of Ohio—no such sales agents being located in this State—, which orders were forwarded to New York and were subject to acceptance or rejection by the office of the corporation in said city. When such orders were accepted by the New York office, shipping orders were forwarded from that office to the Ohio plant from which the products were shipped to points in the State of Ohio and elsewhere pursuant to such sales orders so made and accepted; and no shipments or deliveries from the Ohio plant were made except those confirmed by such shipping orders. As above indicated, all checks in payment of

the purchase price of the products of the company sold by the company and delivered from its plant at Carthage, Ohio, pursuant to such sales orders, were made payable to the [fol. 85] company at its office in New York City. In this connection it does not appear that any of the accounts receivable or of the moneys received by the company in payment of the same were used by the company in connection with its business in Ohio as distinguished from the general business of the company; but on the contrary, it does appear that such accounts receivable and the avails thereof were used by the appellant in its business generally and wherever conducted.

From the stipulation of facts filed herein it appears that during the calendar year 1943 the corporation shipped \$166,044,382.00 worth of its products from all of its plants and warehouses throughout the United States wherever manufactured, and included in the aggregate amount and value of such products were products of the amount and value of \$56,819,430.00 which, during said calendar year, were shipped from its said plant and plant warehouses in Ohio to customers throughout the United States.

It appears that the appellant, in filing its annual intangible and personal property return for the tax year 1944, did not allocate any of its accounts receivable to the State of Ohio; and that thereafter the tax commissioner, on audit of said annual return, corrected the same by ascribing an Ohio situs to a part of the accounts receivable of the appellant in the sum of \$2,996,670.00, which accounts receivable, amounting to 34.2191% of all of its accounts receivable for the calendar year 1943, arose from sales of its products which were shipped from its plant and plant warehouses in Ohio to customers throughout the United States.

The question presented in this appeal as to whether or not the tax commissioner erred in allocating said accounts receivable to the State of Ohio and in including the same as a part of the taxable property of the appellant for the tax year 1944, requires a consideration of the pertinent provisions of sections 5328-1 and 5328-2, General Code. Section 5328-1, General Code, which is the declaratory section with respect to the taxation of intangible property, provides generally that all moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as pro-



vided in said section or as otherwise provided or exempted in the title of which this section is a part. This section further provides as follows:

Property of the kinds and classes mentioned in section 5328-2 of the General Code (including accounts receivable), used in and arising out of business transacted in this state by, for or on behalf of a non-resident person . . . shall be subject to taxation, and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons . . . shall not be subject to taxation.

[fol. 86] Section 5328-2, General Code, provides:

Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state. . . .

This section further provides as follows:

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident per-

son, such decision shall be deemed also to effect such provision as applied to property of a resident, but shall not affect any other provision hereof.

Section 5325-1, General Code, which defines the term 'used in business' in connection with the taxation of tangible and intangible personal property, provides, among other things, as follows:

'Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. "Business" includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.'

Referring to the above quoted statutory provisions and, [fol. 87] particularly, to the provision of section 5328-2, General Code, that 'the provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this State shall be taxed herein and no property of such kinds and classes belonging to a person residing in this State and having a business situs outside of this State shall be taxed', it may be observed that these statutory provisions indicate a policy to treat, so far as possible, domestic corporations and other residents of this state on one hand, and foreign corporations and other nonresidents on the other hand, on a basis of equality with respect to the taxation of business intangibles. Although the term 'business situs', as used in the above quoted provision of section 5328-2, General Code, is not therein further defined, we are admonished in and by the decision of the Supreme Court of this State in the case of *The Ransom & Randolph Company v. Evatt*, Tax Commr., 142 O. S. 398, 408, that section 5328-2, General Code, fixes the business situs of accounts receivable and other classes of intangible property therein referred to, and that, for this purpose, effect is to be given to this statute rather than to any general rule which might otherwise be applicable to cases of this kind.

On the consideration of the case of *The Ransom & Randolph Company v. Evatt*, when the same was before the



Board of Tax Appeals for decision, 25 O. O. 253, which case involved the question as to the taxable situs of the accounts receivable of an Ohio corporation which arose in the transaction of the business of the company in the States of Indiana and Michigan, this Board was required to construe and apply the statutory provisions above quoted and particularly the provision of section 5328-1, General Code, that 'all such property (accounts receivable and other kinds and classes of intangible property mentioned in section 5328-2, General Code) of persons residing in this State used in an arising out of business transacted outside of this state by, for and on behalf of such persons, \* \* \* shall not be subject to taxation.' On a consideration of the statutory provisions above noted, the Board of Tax Appeals was of the view that before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicile of the taxpayer, it must appear, that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other state, but were therein so used as to become an integral part of the business carried on in such other state; and that it was not sufficient that such accounts receivable and other intangible property be used in business generally by the taxpayer. And on this view the Board held that the accounts receivable there in question, although they arose in the conduct of taxpayers' business in the States of Indiana and Michigan, did not have a business situs in such states, and that such accounts receivable were taxable in Ohio.

[fol. 88] On the appeal of the decision of the Board of Tax Appeals in The Ransom & Randolph Co. case to the Supreme Court of Ohio, that Court reversed the decision of the Board of Tax Appeals upon the point above indicated. 142 O. S. 398, 404. That Court, upon consideration of the applicable provisions of section 5328-2 and related sections of the General Code above noted, held that the accounts receivable of a taxpayer which arose in the conduct of its business in a state or states other than the state in which it had its domicile or place of residence, had a business situs in such other state or states if such accounts receivable or the avails thereof are being applied or are intended to be applied in the conduct of the taxpayer's business, whether in this State or elsewhere. This view of the Supreme Court as to the

construction to be placed upon the statutory provisions here in question was later followed by that Court in its decisions in the cases of *The Haverford Company v. Evatt*, Tax Commr., 143 O. S. 58, and *National Cash Register Company v. Evatt*, Tax Commr., 146 O. S. 597.

The appellant, as a corporation organized and existing under the laws of the State of Virginia, is a legal resident of that state; and as to the appellant corporation the State of Ohio is 'a state other than that in which the owner thereof resides' and 'such other state' within the provisions of section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this Board hereby finds—in the conduct of its business in the State of Ohio by the sale of its products from a stock of goods located in this State, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this State or elsewhere, such accounts receivable have a business and taxable situs in the State of Ohio, as found and determined by the tax commissioner.

With respect to a question such as that here presented, to wit, that as to the taxation of the accounts receivable of foreign corporation arising in the conduct of its business in this State, the application of the above noted provisions of sections 5328-1, 5328-2 and other related sections of the General Code, as the same have been construed by the Supreme Court, presents, to our mind, a serious question as to the constitutionality of said statutory provisions as so construed under the Due Process of Law Clause of the Federal Constitution. However, as to this, it is fair to state that recently the Supreme Court of the State of Georgia in the [fol. 89] case of *Parke, Davis & Co. v. Atlanta*, 200 Ga. 296, 163 A.L.R. 976, 36 SE (2d) 773, sustained a tax under the laws of that state on the accounts receivable of a foreign corporation which arose from the sale and delivery of its products from a stock of goods in the City of Atlanta in said state. The decision of the court on this point, as indi-



cated by the syllabi in the report of such decision, is as follows:

'Where a foreign corporation kept a stock of goods in a warehouse in the City of Atlanta, Ga.; orders were received and approved outside the state, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the City of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by the nonresident owner, for the merchandise sold in the municipality, are passed upon as to the credit of customers, and the books of account are kept, at a point without the City of Atlanta and the State of Georgia.

'Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this State, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment of the Constitution of the United States, or paragraphs 2 and 3 of section 1 in article 1 of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon, and the books of account kept by the corporation at a point without the state.'

With respect to the constitutional aspects of the question here represented, the Case of Parke, Davis & Co. v. Atlanta, supra, cannot be distinguished on the facts from the case at bar; for in that case, as in this, the accounts receivable which arose in the conduct of the taxpayer's business in the taxing state were not used otherwise than in the transaction of the taxpayer's business generally and as a whole.

Whatever the answer may be as to the constitutionality of the above quoted provisions of section 5328-1, 5328-2 and related sections of the General Code, as the same have been heretofore construed by the Supreme Court of this State, in their application to the facts of this case, it is quite clear

[fol. 90] that the Board of Tax Appeals, as an administrative and quasi judicial board or tribunal, has no jurisdiction and authority to consider and determine such constitutional question. See *Hillsborough Township v. Cromwell*, U. S. Sup. Ct., Case No. 197, 90 L. Ed., 298, 302; *Schwartz v. Essex County Board of Taxation*, 129 N. J. 129, 132, affirmed 130 N.J.L. 177. In the case last above cited it was said:

It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi-judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body.

The Board of Tax Appeals is, of course, bound by the above cited decisions of the Supreme Court of this State construing the above quoted statutory provisions as to the business situs of accounts receivable and other intangible property; and in this view the assessment and order of the tax commissioner complained of in this appeal is hereby affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

(S.) Edward J. Kirwin, Secretary. (Seal.)

The finding, order and decision of the Board of Tax Appeals of the State of Ohio, hereinabove quoted, is an affirmance of a certain finding, assessment, certification and order rendered by the appellee against the appellant, The National Distillers Products Corporation.

The appeal is on questions of law and is taken to the Supreme Court of Ohio in a case involving the revisory jurisdiction of the Supreme Court of Ohio from an order, [fol. 91] finding and decision made and entered by the Board of Tax Appeals of the State of Ohio. This appeal also involves constitutional questions.



National Distillers Products Corporation is the appellant and C. Emory Glander, Tax Commissioner of the State of Ohio, is the appellee herein.

Appellant says that there is error in said record and proceedings before the Board of Tax Appeals of the State of Ohio, in this, to-wit:

1. That the Board of Tax Appeals erred in approving and confirming the assessment, certification and order made against the appellant by the appellee for intangible personal property taxes for the year 1944;

2. That the Board of Tax Appeals erred in approving and confirming the determination, finding, assessment and order of the Department of Taxation of the State of Ohio, as made and entered by the Tax Commissioner of the State of Ohio, appellee herein, against the appellant, a Virginia corporation, with its principal commercial and business office in New York City, that the accounts receivable of the appellant, a foreign corporation, arising out of sales made and completed in other states by its agents and employees in other states, from goods manufactured in and shipped from Ohio on instructions from its principal business office in another state, and which accounts receivable were payable outside of Ohio, and all payments thereon deposited in banks [fol. 92] in other states, had a tax situs in Ohio and were allocable to Ohio for the purpose of taxation;

3. That the Board of Tax Appeals erred in approving and confirming the action of the appellee herein in finding and determining that the aforesaid accounts receivable of the appellant, a foreign corporation, not used in or arising out of business transactions in Ohio, had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

4. That the Board of Tax Appeals erred in approving and confirming the finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were taxable in Ohio under Section 5328-1 and 5328-2 of the General Code of Ohio;

5. That the finding, determination, assessment and order of the appellee, approved and confirmed by the Board of Tax Appeals, that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation and taxable in Ohio, is contrary to and violates Sec-

tion 8 of Article I of and the Fourteenth Amendment to the Constitution of the United States; and Section 1, 2 and 19 of Article I of the Constitution of the State of Ohio;

6. That the Board of Tax Appeals erred in failing to determine and decide whether Section 5328-2 of the General Code of Ohio as interpreted and applied by the appellee with reference to the aforesaid accounts receivable of the appellant, violates Section 1, 2 and 19 of Article I of the Constitution of the State of Ohio and Section 8 of Article I of and the Fourteenth Amendment to the Constitution of the United States;

[fol. 93]. 7. That the Board of Tax Appeals erred in failing to reverse or vacate the determination, finding, assessment and order of the appellee made against the appellant taxing the accounts receivable of the appellant arising out of sales made and completed in other states by its agents and employees in other states from goods manufactured in and shipped from Ohio on instructions from its principal office in another state, and which said accounts receivable were payable outside of Ohio and payments thereon deposited in banks outside of Ohio;

8. That the decision and judgment of the Board of Tax Appeals with respect to the listing, assessing and taxing of the aforesaid accounts receivable of the appellant is unreasonable and unlawful.

(S.) Isadore Topper, Attorney for Appellant.

[File endorsement omitted.]

[fol. 94]

IN SUPREME COURT OF OHIO

[Title omitted]

Appeal from the Board of Tax Appeals

RECORD—Filed June 6, 1947

(Here follows 1 Photolithograph, side folios 95-96)





STATE OF OHIO

National Distillers Products Corp.  
120 Broadway  
New York, New York

N-11

Tax Form No. 905 V  
Prescribed by  
Tax Commissioner, State of Ohio

NO. 1289

(TAX COMMISSIONER'S COPY)  
PRELIMINARY ASSESSMENT CERTIFICATE

The Tax Commissioner hereby certifies that the following is the preliminary assessment of the taxable property of the above named taxpayer chargeable on the Intangible Property Tax List and Duplicate of the Auditor of State for the year 1945. 1944 - Dec. 5, 1945

RET. FORM NO. 943

CLASSIFIED TAX LIST	TOTAL			RATE	AMOUNT OF TAX		
Investments yielding income	\$			5%	\$		
Investments not yielding income				2 mills			
Deposits				2 mills			
Credits		2	996	3 mills	8	990	01
Moneys and other taxable intangibles				4 mills			
TOTAL CLASSIFIED TAX	\$				\$		

(SEAL) Assessment under decision of the Supreme Court of Ohio in the case of The Ransom and Randolph Company v. Evatt, Tax Commissioner (142 O. S. 398)  
No former assessment for this company

  
Tax Commissioner

C O P Y

221





[fol. 96a] BEFORE THE DEPARTMENT OF TAXATION, STATE OF  
OHIO

In the Matter of the Application for Review and Redetermination of the National Distillers Products Corp.

Application for Review and Redetermination

Now comes the National Distillers Products Corporation, and herewith makes application for review and redetermination of the personal property tax assessment for the year 1944 made against it on December 5, 1945, based on the decision of the Supreme Court of Ohio in Ransom and Randolph v. Evatt, 142 O. S., 398, for the following reasons:

1. No personal property (credits) taxable in Ohio was omitted from its 1944 return;

2. That the credits taxed by the preliminary assessment certificate issued on December 5, 1945, against the undersigned corporation, a foreign corporation, with its principal office and place of business outside the state of Ohio, arose out of sales made and completed in other states, with the said accounts receivable payable outside of Ohio and the avails thereof used outside of Ohio;

3. That the aforesaid credits taxed by the aforesaid preliminary assessment certificate issued on December 5, 1945, did not arise out of business transacted in Ohio and were not used in Ohio;

4. That the determination and assessment made by the tax commissioner that the aforesaid accounts receivable [fol. 97] of the National Distillers Products Corporation are allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of Section 8 of Article 1 of, the Fourteenth Amendment to the Constitution of the United States, and in Sections 1 and 19 of Article 1 of the Constitution of the state of Ohio.

National Distillers Products Corporation, By: Secy-  
Treas. (S.)

BEFORE DEPARTMENT OF TAXATION, STATE OF OHIO

DECISION OF TAX COMMISSIONER—Filed January 8, 1946

The application of the National Distillers Products Corporation, (Inter-county), New York, New York, for review



and redetermination of an additional intangible personal property tax assessment against such applicant for the year 1944, after being duly heard, came on to be considered.

The tax commissioner, being fully advised in the premises, finds that part of the assessment complained of imposed an additional tax upon the applicant in that certain of its "accounts receivable" were given an Ohio situs for the purpose of computing its "net taxable credits" for the year here under consideration, whereas the applicant had not allocated any of its "receivables" into Ohio for such purpose.

The tax commissioner, being further advised in the premises, and in view of the decision of the Ohio Supreme Court in the case of Ransom and Randolph v. Evatt, 142 O. S., 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code, finds that the assessment as heretofore made by this department with [fol. 97a] respect to the item of "net taxable credits" was in every respect proper.

The applicant at the time of said hearing contested the validity of such assessment with respect to allocating to Ohio certain of its "accounts receivable" on the grounds that the provisions of Section 5328-2, General Code, are not applicable and further that the construction of Sections 5325-1 and 5328-2, General Code, adopted by the tax commissioner, is in violation of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the state of Ohio for, as construed, such sections operate to tax intangible property of a nonresident over which Ohio has no jurisdiction and which has no business situs in Ohio. As to such contention, the tax commissioner holds that he is without authority to set aside acts of the legislature on constitutional grounds.

In addition to the foregoing contentions the applicant at the time of such hearing also raised the issue that the assessment was illegal and improper in that the "accounts receivable" which this department allocated to Ohio did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the tax commissioner that the "receivables", as heretofore allocated to Ohio, did result from the sale of property from a stock of goods.

maintained within this state and such contention is accordingly denied.

In view of the foregoing, it is, therefore, ordered by the tax commissioner that the application for review and re-determination be and the same is hereby denied.

Department of Taxation, C. Emory Glander, Tax Commissioner.

[Duly certified.]

[fol. 98] BEFORE DEPARTMENT OF TAXATION, STATE OF OHIO

CORPORATION RETURN OF TAXABLE PROPERTY FOR 1944

Name of corporation, National Distillers Products Corporation.

This return is made by the above named corporation as holder of fifty-one per cent or more of the common stock of the following named corporations:

Name, W. & A. Gilbey, Ltd.; address, 120 Broadway New York 5, New York; state in which organized, Delaware; date of organization, 2-27-35; number of shares of outstanding common stock, 1,550,000; number owned by reporting company, 1,033,333; number shares owned by Ohio individuals, none.

Intangible Property

Bonds, notes, mortgages, debentures, contracts, investment trust shares, deposits, proceeds of matured insurance, patent and copyright royalties, annuities, interest in trust funds, note.

Recapitulation of Classified or Intangible Personal Property

Total Listed Values and Amounts

Item 4, credits—2,996,670. \$8990.01.

**Assessment under decision of the Supreme Ct. of Ohio in the case of R. R. Co. v. Evatt, 142 O. S., 398.**

H. D. 5 12-5-45.

(Matter in boldface type inserted in the return by the department of taxation.)



[fol. 98a]

National Distillers Products Corp.  
and  
W. A. Gilbey, Ltd.

		1944 Return	
		A	C
1944	National Distillers	Deductions	Receivables and Prepaid
B/S Line 17	Notes and/or Accts. Rec.		\$13,969,267.00
B/S Line 40	Prepaid Insurance		470,316.00
B/S Line 41	Prepaid Taxes		40,200.00
B/S Line 43	Prepaid Others		291,674.00
			<hr/> 14,771,457.00
B/S Line 95	Notes Payable	\$ 35,931.00	
98	Trade Payables	*3,644,962.00	
102	Acc'd Interest	321,045.00	
107	Acc'd Other	1,685,959.00	
116	Dividends Payable	1,022,724.00	
			<hr/> 6,710,621.00
Total Deductions			8,060,836.00
Credits C-A			
Credits taxable in Ohio 34.2091% (Bus. Fraction)			2,757,540.00
Tax @ 3M			8,272.62

\* B/S amount of Accts. Payable was reduced by the amount of Accts. Rec. shown on W & A Gilbey B/S \$281,544.00

[fol. 99]

1944	W & A Gilbey, Ltd.		
B/S Line 13	Notes and/or Accts Rec.		-0-
B/S Line 40	Prepaid Insurance		1,239.00
B/S Line 41	Prepaid Taxes		1,220,128.00
B/S Line 43	Prepaid Other		1,034.00
			<hr/> 1,222,401.00
B/S Line 95	Notes Payable	750,000.00	
98	Trade Payable	133,201.00	
107	Acc'd Other	17,149.00	
			<hr/> 900,350.00
Total Deductions			322,051.00
Credits C-A			
Credits taxable in Ohio 74.2537% (Bus. Fraction)			239,130.00
Tax @ 3M			717.39

\* Notes and/or Accts. Rec. in amount \$281,554.00 were entirely eliminated as these accts. were owned by the parent company.

National	\$2,757,540.00
Gilbey	239,130.00
	<hr/>
Total	2,996,670.00
Tax @ 3M	8,990.01

[fol. 99a] BEFORE BOARD OF TAX APPEALS OF OHIO, DEPARTMENT OF TAXATION

PETITION ON APPEAL—Filed January 16, 1946

Appellant says there is error in said record and proceedings before the appellee, C. Emory Glander, tax commissioner of the state of Ohio, in this, to wit:

1. The appellee erred in denying the application of the appellant for review and correction of an additional intangible personal property tax assessment made against the appellant for the year 1944;

2. The appellee erred in finding and determining that the accounts receivable of the appellant, a foreign corporation, arising out of sales made and completed in other states by its agents in other states and delivered in other states from goods manufactured in Ohio had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

3. The appellee erred in finding and determining that the accounts receivable of the appellant, a foreign corporation not used in or arising out of business transacted in Ohio, had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

4. The finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were taxable in Ohio is contrary to Sections 5328-1 and 5328-2 of the General Code of Ohio;

5. The finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of Section 8 of Article 1 of and the Fourteenth Amendment to the [fols. 100-101] Constitution of the United States, and Sections 1 and 19 of Article I of the Constitution of the state of Ohio;

6. The finding, determination, assessment and order of the appellee is unreasonable and unlawful.

Wherefore, appellant prays that the Board of Tax Appeals, upon hearing this appeal, will find and determine that the order of the appellee denying the application of



the appellant for a review and redetermination of the additional intangible personal property tax assessment made against the appellant for the year 1944 by the appellee was issued in error, and that the finding, determination, assessment and order of the appellee, C. Emory Glander, tax commissioner of the state of Ohio, be reversed, vacated and set aside, and that the appellee be ordered to make and correct his assessment in conformity with the order of the Board of Tax Appeals.

Isadore Topper, Attorney for Appellant.

[fol. 102]

IN SUPREME COURT OF OHIO

National Distillers Products Corp., Appellant, v. Glander, Tax Commr., Appellee.

National Distillers Products Corp., Appellant, v. Evatt, Tax Commr., Appellee.

Wheeling Steel Corp., Appellant, v. Glander, Tax Commr., Appellee.

United States Gypsum Co., Appellant, v. Evatt, Tax Commr., Appellee. (Two Cases.)

Taxation—Corporation franchise and intangible personal property—Foreign corporation maintained Ohio plants which completed orders sold—General books kept and orders accepted at principal office outside Ohio—Accounts receivable or avails thereof used in business generally—Prepaid insurance premiums on property located in Ohio—Sections 5325-1, 5328-1 and 5328-2, General Code.

(Nos. 31037, 31038, 31079, 31080 and 31081—Decided August 4, 1948)

Appeals from the Board of Tax Appeals.

Five cases are here involved.

Each appellant is a foreign corporation which operates at least one manufacturing plant in the state of Ohio. Of the five appeals two have been perfected by the National Distillers Products Corporation, a Virginia Corporation, one by the Wheeling Steel Corporation, a Delaware corporation, and two by the United States Gypsum Company, an Illinois corporation.

[fol. 103] In each case the Tax Commissioner of Ohio made an additional assessment of either intangible personal property tax or corporation franchise tax.

In each instance the order was appealed to the Board of Tax Appeals and was affirmed.

The cases are in this court for review on the contention of the appellant corporations that the decisions of the Board of Tax Appeals are unreasonable and unlawful.

#### OPINION *Per Curiam*

*Mr. Isadore Topper*, for appellant National Distillers Products Corporation.

*Messrs. Dargusch, Caren, Greek & King*, for appellant Wheeling Steel Corporation.

*Messrs. Scott, MacLeish & Falk, Mr. Clarence D. Laylin, Mr. Charles M. Price, Mr. Clifford C. Pratt and Mr. Joseph A. Dubbs*, for appellant United States Gypsum Company.

*Mr. Hugh S. Jenkins*, attorney general, and *Mr. Daronne R. Tate*, for appellee.

By the Court. These cases were presented together for the reason that all five of them involve similar questions of situs under the provisions of Sections 5328-1 and 5328-2, General Code.

These and cognate provisions have been discussed and applied in many recent decisions by this court. *Alluminum Co. of America v. Evatt, Tax Commr.*, 140 Ohio St., 385, 45 N. E. (2d), 118; *Procter & Gamble Co. v. Evatt, Tax Commr.*, 142 Ohio St., 369, 52 N. E. (2d) 517; *Ransom & Randolph Co. v. Evatt, Tax Commr.*, 142 Ohio St., 398, 52 N. E. (2d), 738; *Haverfield Co. v. Evatt, Tax Commr.*, 143 Ohio St., [fol. 104] 58, 54 N. E. (2d), 149; *C. F. Kettering, Inc., v. Evatt, Tax Commr.*, 144 Ohio St., 419, 59 N. E. (2d), 370; *National Cash Register Co. v. Evatt, Tax Commr.*, 145 Ohio St., 597, 62 N. E. (2d), 327; *American Rolling Mill Co. v. Evatt, Tax Commr.*, 147 Ohio St., 207, 70 N. E. (2d), 651.

Section 5325-1, General Code, reads as follows:

“Within the meaning of the term ‘used in business,’ occurring in this title, personal property shall be considered to be ‘used’ when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on



the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a nonresident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code, reads in part as follows:

"\* \* \* Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code \* \* \* shall be subject to taxation \* \* \*"

[fol. 105] Section 5328-2, General Code, contains the following provisions:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state, \* \* \*

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and

classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a nonresident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The facts relating to two of the companies here involved are not in dispute and are supplied by stipulations. The two concerning the National Distillers Products Corporation are ten and nine pages respectively in length and need [fol. 106] not be quoted in full for the purposes of this discussion. As above indicated, this company is a Virginia corporation. Its shareholders' meetings are held in that state. Its principal business office is located in the city of New York where the meetings of its directors are held and where all its business activities are controlled. All its accounts payable are paid from funds on deposit there. It has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton county, Ohio. It sells its products in every state where such products may be sold legally. Pay-roll checks for employees of these several plants and checks for federal excise taxes due from these plants are paid with funds on deposit in banks in those localities. The funds are obtained through checks drawn at the New York office on banks in that city. All accounts receivable are posted in the books of the company in the New York office where the accounts are payable. All the receipts are deposited in New York banks. The accounts receivable, the allocation of which resulted in the additional assessments of intangible property tax and corporation franchise tax, arose from the sale of products manufactured



by the company at its Carthage plant. The products were shipped from a stock of goods maintained by the company at that plant to points in Ohio and other states. All orders for the sale of these products were solicited by agents outside of Ohio. The orders were forwarded to New York and [fol. 107] were subject to acceptance or rejection at the New York office. When orders were accepted, shipping instructions were forwarded to the Ohio plant from which the products were then shipped to the designated points in Ohio and elsewhere. The moneys received from the accounts receivable were used by the company in its business generally wherever needed. In filing its annual report and tax return the company allocated none of its accounts receivable to Ohio.

In its opinion the Board of Tax Appeals correctly summarized the matter as follows:

"The appellant, as a corporation organized and existing under the laws of the state of Virginia, is a legal resident of that state; and as to the appellant corporation the state of Ohio is 'a state other than that in which the owner thereof resides' and such other state within the provisions of Section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this board hereby finds—in the conduct of its business in the state of Ohio by the sale of its products from a stock of goods located in this state, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this state or elsewhere, such accounts receivable have a business and taxable situs in the state of Ohio, as found and determined by the Tax Commissioner."

The company contends further that this interpretation of Section 5328-2, General Code, renders these provisions violative of the due-process and equal-protection clauses of [fol. 108] the state and federal constitutions. However,

this question was squarely and properly decided in the recent case of *Parke, Davis & Co. v. City of Atlanta*, 200 Ga., 296, 36 S. E. (2d), 773, 163 A. L. R., 976, in which the first and fourth paragraphs of the syllabus read as follows:

"1. Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the state, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the city of Atlanta, and would have a taxable situs for *ad valorem* taxation by said municipality, notwithstanding that the orders taken by the nonresident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the city of Atlanta and the state of Georgia. \* \* \*

"4. Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment to the Constitution of the United States, or paragraphs 2 and 3 of Section 1 in Article I of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the state."

The facts concerning the Wheeling Steel Corporation are embodied likewise in a stipulation. As already stated, it is a Delaware corporation and maintains an office in that state. However, Wheeling, West Virginia, is the location of its principal office and place of business where all meetings of the shareholders, directors and executive committee are held. Its general books and accounting records are kept there. All credit is determined there; and the collections of notes and accounts receivable are made there. Four manufacturing plants are operated



in West Virginia and four in Ohio. Sales offices are maintained in twelve states—one in Ohio. When notes and accounts receivable are paid, the avails thereof are applied indiscriminately to the general purposes of the company's business, whether in Ohio or elsewhere. Pay rolls are prepared and pay-roll checks are prepared, signed and distributed at each plant. Bank balances sufficient for this purpose are maintained in each such community.

In its opinion the Board of Tax Appeals said in part:

"It is clear that under this statute (Section 5328-1, General Code) intangibles owner by a nonresident cannot be taxed unless they are both used in business in this state and arise out of business transacted here.

\* \* \*

"Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this state and elsewhere, they must be held to be used in business within the meaning of this statute (Section 5325-1, General Code). \* \* \*

"It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118, decided by this board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with

reference to a franchise tax assessment decided on the same date and bearing No. 9095.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state, and, consequently are taxable here.

"No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this state. As to this, Section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The board finds that these prepaid items relate to property used in appellant's business in this state and, in view of the above statutory provisions arose out of business transacted in this state and are, therefore, taxable."

[fol. 111] The facts concerning the United States Gypsum Company are presented by a stipulation of facts and the testimony of two witnesses.

This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All payroll checks are prepared and signed there and are drawn on funds there and in Ohio. Sales are managed and directed through divisional and district sales offices. Two district offices are located in Ohio. Orders taken by sale-men are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when



shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States, and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere.

[fol. 112] In its opinion the Board of Tax Appeals reached the following conclusion:

"The evidence shows that certain manufacturing or processing of the raw products, which were kept on hand at its Ohio plants in sufficient quantities to fill any orders that may be received, was necessary to convert them into the completed products ordered. This process took anywhere from approximately four minutes to less than one hour. The board is of the opinion that it makes no difference whether the products were put into their completed form before or after the orders therefor were accepted and received. The evidence shows that the appellant did maintain in Ohio a stock of goods which was necessary to make the completed products sold by it. The same questions arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118 decided by this board on March 12, 1947, and the case of *Wheeling Steel Corporation v. Glander*, No. 9681 decided by this board April 7, 1947. Reference is hereby made to the entries in those cases and also to the case of *National Distillers Products Corporation v. Glander*, No. 9095 with reference to a franchise tax assessment decided on March 12, 1947.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio."

The company insists that there is a total lack of integration of the accounts receivable with that part of the company's total business which is conducted in Ohio. This court finds that it cannot agree with this contention. In

this and the other cases the decisions of the Board of Tax Appeals must be affirmed.

Decisions affirmed.

Weygandt, C. J., Turner, Matthias, Hart, Zimmerman, Solingen and Stewart, JJ., concur.

[fol. 113] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 114] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed August 16, 1948

Now comes National Distillers Products Corporation, the appellant in the above styled cause, and hereby makes application for rehearing this case for the following reasons:

(1) The opinion and decision of the court decide adversely to the appellant the question of whether the taxation of the intangible personal property in question under the stipulation of facts in this cause constituted a violation of the rights secured to appellant by the Constitution of the United States without recognition by the court that the question of the applicability of the interstate commerce clause, Section 8 of Article I of the Constitution of the United States, had been raised by this appellant, whereas such question was raised and presented to this court both in the assignment of errors and in the brief of appellant herein;

(2) The opinion and decision of the court in this case should be examined and reconsidered in the light of the [fol. 115] decision of the Supreme Court of the United States in *Memphis Natural Gas Company v. Stone*, 92 L. Ed., 1409, decided June 21, 1948, approving and amplifying the principles of law announced in the cases of *Freeman v. Hewit*, 329 U. S., 249, 91 L. Ed., 265 and *Joseph v. Carter & Weekes Stevedoring Company*, 330 U. S., 422, 91 L. Ed., 993; said decision in *Memphis Natural Gas Company v.*



*Stone*, supra, was announced subsequently to the filing of briefs and the oral argument in this case;

(3) The attention of the court is respectfully called to the fact that its opinion virtually adopted the opinion and decision of the Board of Tax Appeals in this case, whereas said opinion and decision of the Board of Tax Appeals specifically omitted consideration of the constitutional questions involved herein, for the reason that said board was of the opinion that it did not have authority to consider and pass upon constitutional questions;

(4) The decision is of public and great general interest in this state, in that it presents a definition of "business situs" of intangible personal property which has hitherto not been adopted by any court of last resort of any state in the United States or by the Supreme Court of the United States; such definition of "business situs" makes no requirement of any local incident of taxable situs except such necessary local element of sale as is inextricably connected with interstate commerce;

(5) The decision of the court in upholding the application [fol. 116] of Section 5328-2 of the General Code of Ohio to the intangible personal property of appellant as set forth in the stipulation of facts filed herein is violative of Section 8 of Article I of the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States and Section 1, 2 and 19 of Article I of the Constitution of the State of Ohio;

(6) The attention of the court is respectfully called to the fact that in its opinion there is no discussion of the important argument of appellant with respect to the violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States inherent in the taxation of intangible personal property in this case, except in the reliance of the court upon the decision in *Parke, Davis and Company v. City of Atlanta*, 200 Ga., 296, 36 S. E. (2d), 773, which case was never reviewed by the Supreme Court of the United States; further, that there was no discussion in the opinion of the court of the several important decision of the Supreme Court of the United States cited by this appellant in its brief with respect to the application of the equal protection clause of the Constitution

of the United States to facts analogous to those in the instant case;

(7) The factual premise upon which the opinion and decision of the court is based is erroneous, it is respectfully submitted, for the reason that such premise assumes that sales were made by appellant from stocks of goods maintained in Ohio, whereas in the stipulation of facts filed [fol. 117] herein, it is stated that at the only plant of appellant located in the State of Ohio no whiskey was rectified, blended or bottled for inventory for shipping against future orders; thus, that no stock of goods was in fact maintained in Ohio from which sales were made;

(8) The decision of the court on the appeal of the appellant from the decision of the Board of Tax Appeals is of great public interest to the state and the people therein, and particularly to taxpayers engaged in interstate commerce involving interstate sales in Ohio and elsewhere, as directly involving the power of the State of Ohio to levy a tax on accounts receivable of a foreign corporation, which accounts receivable have arisen from sales made in interstate commerce and the proceeds of which are used generally in the business of such foreign corporation.

Appellant, being desirous of bringing the foregoing to the court for its consideration, respectfully submits this application for a rehearing.

(S.) Isadore Topper, 17 South High Street, Columbus 15, Ohio; Attorney for Appellant.

[File endorsement omitted.]

[fol. 118] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT  
OF TAXATION OF OHIO

No. 11118

NATIONAL DISTILLERS PRODUCTS CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee

SECRETARY'S CERTIFICATE—Filed April 18, 1947

I hereby certify the attached to be a true and correct transcript of the record of the proceedings of the Board of Tax Appeals of the Department of Taxation of Ohio



pertaining to the decision complained of and all the evidence offered to and considered by the Board of Tax Appeals in making such decision.

(S.) Edward J. Kirwin, Secretary. (Seal.)

[File endorsement omitted.]

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[fol. 119] BEFORE BOARD OF TAX APPEALS OF OHIO

ABSTRACT OF DOCKET

No. 11118

Appellant: National Distillers Product Corporation.

Appellee: C. Emory Glander, Tax Commissioner of Ohio.

Attorneys: Isadore Topper, Columbus, Ohio, on behalf of the appellant. Hon. Hugh S. Jenkins, Attorney General of Ohio, and Daronne R. Tate, Assistant Attorney General, on behalf of the appellee.

Filed: January 16, 1946.

Nature of Appeal: Intangible personal property tax assessment.

Date of Hearing: Stipulation of Facts—March 18, 1946.

Journal Entry: March 12, 1947.

Appealed to Supreme Court: April 2, 1947.

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[fol. 120] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION, STATE OF OHIO

[Title omitted]

NOTICE OF APPEAL AND PETITION ON APPEAL—Filed January 16, 1946

Now comes the appellant, National Distillers Products Corporation, and hereby gives notice that it is appealing from a finding, determination, assessment and order made by the appellee, C. Emory Glander, Tax Commissioner of the State of Ohio on January 8, 1946 to the Board of Tax Appeals, and the appellant hereby appeals to the Board of Tax Appeals for a review and redetermination of the finding, determination, assessment and order made and issued by

the appellee, C. Emory Glander, Tax Commissioner of the State of Ohio, on January 8, 1946 and which finding, determination assessment and order made by the appellee reads as follows:

[fol. 121] "DEPARTMENT OF TAXATION OF OHIO

No. 2498

In the Matter of the Application of the NATIONAL DISTILLERS PRODUCTS CORPORATION, (INTER-COUNTY), New York, N. Y., for Review and Redetermination for the year 1944

Jan. 8, 1946.

The application of the National Distillers Products Corporation, (Inter-County), New York, N. Y., for review and redetermination of an additional intangible personal property tax assessment against such applicant for the year 1944, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that part of the assessment complained of imposed an additional tax upon the applicant in that certain of its "accounts receivable" were given an Ohio situs for the purpose of computing its "net taxable credits" for the year here under consideration, whereas the applicant had not allocated any of its "receivables" into Ohio for such purpose.

The Tax Commissioner, being further advised in the premises, and in view of the decision of the Ohio Supreme Court in the case of Ransom & Randolph vs. Evatt, 142 O.S. 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code, finds that the assessment as heretofore made by this department with respect to the item of "net taxable credits" was in every respect proper.

The applicant at the time of said hearing contested the validity of such assessment with respect to allocating to Ohio certain of its "accounts receivable" on the grounds that the provisions of Section 5328-2, General Code, are not applicable and further that the construction of Sections 5328-1 and 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the 14th Amendment to the Constitution of the United States and the Constitution of the State of Ohio for, as construed, such sections operate to



tax intangible property of a non-resident over which Ohio has no jurisdiction and which has no business situs in Ohio. As to such contention, the Tax Commissioner holds that he is without authority to set aside Acts of the Legislature on constitutional grounds.

In addition to the foregoing contentions the applicant at the time of such hearing also raised the issue that the assessment was illegal and improper in that the "accounts receivable" which this department allocated to Ohio did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the [fol. 122] General Code. It is the holding of the Tax Commissioner that the "receivables", as heretofore allocated to Ohio, did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.

In view of the foregoing, it is therefore, ordered by the Tax Commissioner that the application for review and re-determination be and the same is hereby denied.

Department of Taxation. (S.) C. Emory Glander,  
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

(S.) Emory Glander, Tax Commissioner."

Appellant says there is error in said record and proceedings before the appellee, C. Emory Glander, Tax Commissioner of the State of Ohio, in this, to-wit:

1. The appellee erred in denying the application of the appellant for review and correction of an additional intangible personal property tax assessment made against the appellant for the year 1944;

2. The appellee erred in finding and determining that the accounts receivable of the appellant, a foreign corporation, arising out of sales made and completed in other states by its agents in other states and delivered in other states from goods manufactured in Ohio had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

3. The appellee erred in finding and determining that the accounts receivable of the appellant, a foreign cor-

poration not used in or arising out of business transacted [fol. 123] in Ohio, had a situs in Ohio and were allocable to Ohio for the purpose of taxation;

4. The finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were taxable in Ohio is contrary to sections 5328-1 and 5328-2 of the General Code of Ohio;

5. The finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of section 8 of Article 1 of the 14th Amendment to the Constitution of the United States, and sections 1 and 19 of Article I of the Constitution of the State of Ohio;

6. The finding, determination, assessment and order of the appellee is unreasonable and unlawful.

Wherefore, appellant prays that the Board of Tax Appeals, upon hearing this appeal, will find and determine that the order of the appellee denying the application of the appellant for a review and redetermination of the additional intangible personal property tax assessment made against the appellant for the year 1944 by the appellee was issued in error, and that the finding, determination, assessment and order of the appellee, C. Emory Glander, Tax Commissioner of the State of Ohio, be reversed, vacated and set aside, and that the appellee be ordered to make and correct his assessment in conformity with the order of the Board of Tax Appeals.

(S.) Isadore Topper, Attorney for Appellant, 306  
Huntington Bank Building, Columbus 15, Ohio.

[File endorsement omitted.]



[fol. 124] BEFORE DEPARTMENT OF TAXATION OF OHIO

Appeal No. 11118

In the matter of the Appeal before the Board of Tax Appeals filed by THE NATIONAL DISTILLERS PRODUCTS CORPORATION AND W & A GILBEY, LTD.—Inter-county—1944 personal property tax return

CERTIFICATE OF TAX COMMISSIONER

I hereby certify that the papers hereto attached are a complete transcript of the record of the proceedings before the Tax Commissioner of Ohio, together with all evidence, documentary and otherwise, considered by him in connection with the assessment therein described.

Department of Taxation, (S.) C. Emory Glander,  
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation this day taken by the Tax Commissioner with respect to the above matter.

(S.) C. Emory Glander, Tax Commissioner.

Filed Feb. 19, 1946, Board of Tax Appeals.

[fol. 125] EMORY GLANDER, TAX COMMISSIONER, DEPARTMENT  
OF TAXATION, STATE OF OHIO

Preliminary Assessment Certificate No. 1289

In the matter of the application for Review and Redetermination of the NATIONAL DISTILLERS PRODUCTS CORP. 120 Broadway, New York, New York

APPLICATION FOR REVIEW AND REDETERMINATION

Now comes the National Distillers Products Corporation, and herewith makes application for review and redetermination of the personal property tax assessment for the year 1944 made against it on December 5, 1945, based on the

decision of the Supreme Court of Ohio in Ransom and Randolph v. Evatt, 142 O. S. 398 for the following reasons:

1. No personal property (credits) taxable in Ohio was omitted from its 1944 return;

2. That the credits taxed by the preliminary assessment certificate issued on December 5, 1945 against the undersigned corporation, a foreign corporation, with its principal office and place of business outside the State of Ohio, arose out of sales made and completed in other states, with the said accounts receivable payable outside of Ohio, and the avails thereof used outside of Ohio;

3. That the aforesaid credits, taxed by the aforesaid preliminary assessment certificate issued on December 5, 1945 did not arise out of business transacted in Ohio and were not used in Ohio;

[fol. 126] 4. That the determination and assessment made by the Tax Commissioner that the aforesaid accounts receivable of the National Distillers Products Corporation are allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of Section 8 of Article I of, and the 14th Amendment to the Constitution of the United States, and in Section 1 and 19 of Article I of the Constitution of the State of Ohio.

National Distillers Products Corporation; by:  
Sec-Treas. (S.)—, —.

[fol. 127] BEFORE DEPARTMENT OF TAXATION OF OHIO

No. 2498

In the matter of the Application of the NATIONAL DISTILLERS PRODUCTS CORPORATION (Inter-county) New York, New York, for Review and Redetermination for the year 1944.

DECISION OF TAX COMMISSIONER—JAN. 8, 1946

The application of the National Distillers Products Corporation, (Inter-county), New York, New York, for review and redetermination of an additional intangible personal property tax assessment against such applicant for the year



[fol. 130]

National Distillers Products Corp.  
and  
W. A. Gilbey, Ltd.

1944		1944 Return	
	National Distillers	A Deductions	C Receivables and Prepaid
B/S Line 17	Notes and/or Accts. Rec.		\$13,969,267.00
B/S Line 40	Prepaid Insurance		470,316.00
B/S Line 41	Prepaid Taxes		40,200.00
B/S Line 43	Prepaid Others		291,674.00
			<hr/> 14,771,457.00
B/S Line 95	Notes Payable	\$ 35,931.00	
	98 Trade Payables	*3,644,962.00	
	102 Acc'd Interest	321,045.00	
	107 Acc'd Other	-1,685,959.00	
	116 Dividends Payable	1,022,724.00	
			<hr/> 6,710,621.00
Total Deductions			8,060,836.00
Credits C-A			
Credits taxable in Ohio 34.2091% (Bus. Fraction)			2,757,540.00
Tax @ 3M			8,272.62

\* B/S amount of Accts. Payable was reduced by the amount of Accts. Rec. shown on W & A Gilbey B/S \$281,544.00

1944		W & A Gilbey, Ltd.	
B/S Line 13	* Notes and/or Accts Rec.		—0—
B/S Line 40	Prepaid Insurance		1,239.00
B/S Line 41	Prepaid Taxes		1,220,128.00
B/S Line 43	Prepaid Other		1,034.00
			<hr/> 1,222,401.00
B/S Line 95	Notes Payable	750,000.00	
	98 Trade Payable	133,210.00	
	107 Acc'd Other	17,149.00	
			<hr/> 900,350.00
Total Deductions			322,051.00
Credits C-A			
Credits taxable in Ohio 74.2537% (Bus. Fraction)			239,130.00
Tax @ 3M			717.39

\* Notes and/or Accts. Rec. in amount \$281,554.00 were entirely eliminated as these accts. were owned by the parent company.

National	\$2,757,540.00
Gilbey	239,130.00
	<hr/>
Total	2,996,670.00
Tax @ 3M	8,990.01

1944, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that part of the assessment complained of imposed an additional tax upon the applicant in that certain of its "accounts receivable" were given an Ohio situs for the purpose of computing its "net taxable credits" for the year here under consideration, whereas the applicant had not allocated any of its "receivables" into Ohio for such purpose.

The Tax Commissioner, being further advised in the premises, and in view of the decision of the Ohio Supreme Court in the case of *Ransom and Randolph v. Evatt*, 142 O. S., 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code, finds that the assessment as heretofore made by this department with respect to the item of "net taxable credits" was in every respect proper.

[fol. 128] The applicant at the time of said hearing contested the validity of such assessment with respect to allocating to Ohio certain of its "accounts receivable" on the grounds that the provisions of Section 5328-2, General Code, are not applicable and further that the construction of Sections 5325-1 and 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the 14th amendment to the Constitution of the United States and the Constitution of the State of Ohio for, as construed, such sections operate to tax intangible property of a non-resident over which Ohio has no jurisdiction and which has no business situs in Ohio. As to such contention, the Tax Commissioner holds that he is without authority to set aside acts of the legislature on constitutional grounds.

In addition to the foregoing contentions the applicant at the time of such hearing also raised the issue that the assessment was illegal and improper in that the "accounts receivable" which this department allocated to Ohio did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the Tax Commissioner that the "receivables", as heretofore allocated to Ohio, did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.



(Here follow 3 photographs, side folios 131, 132, 133)

In view of the foregoing, it is, therefore, ordered by the Tax Commissioner that the application for review and redetermination, be and the same is hereby denied.

[fol. 129] Department of Taxation, (S.) C. Emory Glander, Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

C. Emory Glander, Tax Commissioner.



(Here follows 1 Photolithograph, side folio 129½)

[fol. 134] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT  
OF TAXATION, STATE OF OHIO

[Title omitted]

STIPULATION OF FACTS—Filed March 18, 1946

The parties, by their respective counsel, hereby stipulate and agree that the stipulations hereinafter contained are true, to the extent that they are relevant and competent to the issues in the case at bar, and may be considered as proven; reserving, however, to each of the parties the right to raise objections to any stipulation herein contained on the grounds of relevancy or competency, and reserving further to each of such parties the right to offer additional testimony not inconsistent with the stipulations herein contained and the issues.

1. National Distillers Products Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of Virginia, in which state the stockholders hold their annual meetings.

[fol. 135] 2. National Distillers Products Corporation is qualified and licensed to do business as a foreign corporation in the State of New York, where since 1924 it has maintained its principal business office in the City of New York. Meetings of directors are held in its offices located in the City of New York. Dividends are declared and ordered to be paid at meetings of the directors held in the offices of the corporation in New York City. Dividend checks are drawn and distributed by the dividend distributing agent of the corporation located in New York City and are paid from funds on deposit in banks in the City of New York. The stock registrar and stock transfer agents of the corporation are also located in the City of New York.

3. The president, vice-presidents, treasurer, secretary and executives of the corporation have their offices in the City of New York. All of the business activities of the corporation are determined, directed, governed and controlled from the offices of the corporation located in the City of New York. All accounts payable are paid by checks prepared and signed in the offices of the corporation in New York City and are drawn on funds on deposit in banks in that city, except payroll checks and checks in payment of



## STATE OF OHIO

Tax Form 905 V - Prescribed by  
C. Emory Glander, Tax Commissioner

No. 1289

**PRELIMINARY  
ASSESSMENT CERTIFICATE  
(TAX COMMISSIONER'S COPY)**

Name National Distillers Products Corporation  
 Street 120 Broadway  
 Post Office New York, New York

N-11

Date 19

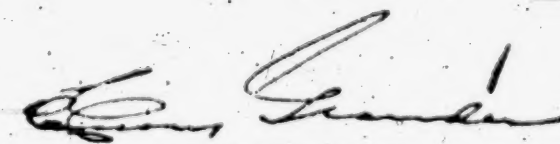
The Tax Commissioner hereby certifies that the following is the preliminary assessment of the taxable property of the above named taxpayer chargeable on the intangible property Tax List and Duplicate of the Auditor of State for the year 1944 - Dec. 5, 1945

CLASSIFIED TAX LIST				RET. FORM NO. 945			
				TOTAL	RATE	AMOUNT OF TAX	
Investments yielding income				\$	5%	\$	
Investments not yielding income					.002		
Deposits					.002		
Credits				2 996 670	.003	8 990 01	
Moneys and other Taxable Intangibles					.003		
TOTAL CLASSIFIED TAX				\$	..	\$	

Assessment under decision of the Supreme Court of Ohio in the case of The Ransom and Randolph Company v. Evatt, Tax Commissioner (142 O. S. 398)  
 No former assessment for this company

C O P Y

(SEAL)

  
 Tax Commissioner

129 1/2

Corporation Return of Taxable Property for ~~1948~~ 1944  
Inter-County or Consolidated

IF A CONSOLIDATED RETURN IS FILED A CONSOLIDATING BALANCE SHEET, INCLUDING ALL CONTROLLED SUBSIDIARIES, IS REQUIRED.

NAME OF CORPORATION NATIONAL DISTILLERS PRODUCTS CORPORATION

This return is made by the above named corporation as holder of fifty-one per cent or more of the common stock of the following named corporations.

[illegible]

This corporation or (if this is a Consolidated return) one or more of its subsidiaries held at listing date personal property in the following counties in Ohio.

COUNTY	TAXING DISTRICT	Name under which business conducted in each location
--------	-----------------	--



INTANGIBLE PROPERTY

BONDS, NOTES, MORTGAGES, DEBENTURES, CONTRACTS, INVESTMENT TRUST SHARES, DEPOSITS (Outside Ohio bearing more than 4%), PROCEEDS OF MATURED INSURANCE, PATENT & COPYRIGHT ROYALTIES (Household Formula) ANNUITIES, INTERESTS IN TRUST FUNDS.

INVESTMENTS  
YIELDING INCOME  
SCHEDULE 6

INVESTMENTS  
NOT  
YIELDING INCOME  
SCHEDULE 7

Name of Corporation, Debtor, Issuer, Trustee	Face Value	% in 1947	Income Yield in 1947	Quotation If Any	True Value Total
NONE					
TOTAL FROM INVESTMENTS YIELDING INCOME FROM FORM 912					
TOTAL INCOME YIELD—Schedule 6				XXXX	XXXX
TOTAL TRUE VALUE—Schedule 7				XXXX	XXXX

The corporation may elect to file with its return or mail to the Tax Commissioner at Columbus, Ohio a verified summary of its Federal Income Tax Return (Form 912) for the last preceding taxable year, together with a statement of the aggregate amount of income derived from investments taxable under Ohio laws, the income from which it is not required to report for federal income tax purposes. The reporting of income by the above method does not relieve the taxpayer from listing investments not yielding income in Schedule 7 above.

If the amount from investments, yielding income as shown on this return differs from the amount from like sources as shown on the Federal Income Tax Return of the Corporation, a statement must be attached explaining this difference.

If the corporation holds investments in its name as nominee a statement must be attached showing the issuer and the name and address of the actual owner.

SCHEDULE 8—DEPOSITS

CHECKING ACCOUNTS, SAVINGS ACCOUNTS, CERTIFICATES OF DEPOSIT OR WITHDRAWABLE STOCK OUTSIDE OHIO—held on November 12, 1947 and yielding 4% or less	\$
POSTAL SAVINGS HELD ON JANUARY 1, 1948	\$
TOTAL DEPOSITS	

SCHEDULE 9—COMPUTATION OF CREDITS TAXABLE IN OHIO

Balance Sheet Line No.	BALANCE SHEET ACCOUNTS	(A) TOTAL DEDUCTIONS	(B) OHIO RECEIVABLES & PREPAIDS	(C) TOTAL RECEIVABLES & PREPAIDS
13	Net Receivables—Due within one year from date of inception	XXXXXXX	\$	\$
20	Prepaid Items—Situated according to location: Insurance	XXXXXXX		
41	Taxes	XXXXXXX		
42	Interest	XXXXXXX		
43		XXXXXXX		
45	Other Intangible Items	XXXXXXX		
	TOTALS (B + C = % Ohio Location)	XXXXXXX	\$	\$
93	Current Notes Payable		XXXXXXX	XXXXXXX
98	Current Trade Accounts Payable		XXXXXXX	XXXXXXX
99	Current Other Accounts Payable		XXXXXXX	XXXXXXX
103	Accrued Interest Expense		XXXXXXX	XXXXXXX
107	Accrued—Other than Interest and Taxes		XXXXXXX	XXXXXXX
	TOTAL DEDUCTIONS	\$	XXXXXXX	XXXXXXX
	CREDITS — (C — A)	XXXXXXX	XXXXXXX	\$
	CREDITS TAXABLE IN OHIO ( % )	XXXXXXX	\$ NONE	XXXXXXX

SCHEDULE 10—MONEY AND OTHER TAXABLE INTANGIBLES

CASH ON HAND OR IN SAFE DEPOSIT BOX (Not on Deposit in Financial Institutions)	
UNCOLLECTED CHECKS, JUDGMENTS, NON INTEREST ACCOUNTS Due after one year from date of inception	NONE
ALL OTHER TAXABLE INTANGIBLES	
NON TAXABLE BONDS AND SECURITIES REPRESENTING PROCEEDS OF TAXABLE PROPERTY CONVERTED AFTER OCTOBER 31, 1947	
DEPOSITS REPRESENTING PROCEEDS OF TAXABLE PROPERTY CONVERTED AFTER NOVEMBER 12, 1947, TO THE EXTENT HELD ON LISTING DAY	
TOTAL AMOUNT OF MONEY AND OTHER TAXABLE INTANGIBLES	

# OATH

SECTION 1322 G. C.

The State of NEW YORK, County of NEW YORK, ss.:

THOS. A. CLARK

being duly sworn, deposes and says that he is

the TREASURER of The NATIONAL DISTILLERS' PRODUCTS Company that he executed the foregoing report in the name of and on behalf of said corporation, and caused its corporate seal to be thereto affixed; that he was authorized to make said statement, and to execute the same, by authority of the corporation and further, such corporation has not during the preceding year, directly or indirectly paid, used or offered, consented or agreed to pay or use, any of its money or property for, or in aid of, any political party, committee or organization, or for, or in aid of, any candidate for political office, or for nomination for any such office, or in any manner used any of its moneys or property for any political purpose whatsoever or for the reimbursement or indemnification of any person or persons for moneys or property so used, and that he is an officer of said corporation, having knowledge of the facts herein set forth, and that the statements contained in said report and in this affidavit are true.

THOS. A. CLARK /s/

Sworn to before me, and subscribed in my presence, this 30 day of March, A. D. 1944

Caroline Dietz /s/

Notary Public

500



# Recapitulation of Classified or Intangible Personal Property

## Total Listed Values and Amounts

CLASSIFIED TAX LIST	TOTAL LISTED VALUE AMOUNT	RATE OF TAX	AMOUNT OF TAX (Rate times Total Listed Value)
Item 1 (From Schedule 6) Investments Yielding Income	\$	5%	
Item 2 (From Schedule 7) Investments Not Yielding Income		.002	
Item 3 (From Schedule 8) Deposits		.002	
Item 4 (From Schedule 9) Credits	2996.670 - 8992.01	.003	
Item 5 (From Schedule 10) Money and Other Taxable Intangibles		.003	
Total Amount Aggregate Listed Value and Classified Tax			NONE

assessments under provisions of  
the property tax of Ohio in the case  
of R. N. Co. v. Enitt, 142 OS 393

N. L. S.

12/5/45

federal excise taxes. Payroll checks for plant employees, including those employed at the plant of the corporation located at Carthage, Hamilton County, Ohio, are paid with funds on deposit in banks in the locality in which the plants [fol. 136] are located. The funds for the payroll checking account for each plant are obtained through checks prepared and signed in the offices of the corporation in New York City and are drawn on funds on deposit in banks in that city. Checks for payment of all federal excise taxes are drawn on funds on deposit in banks in the localities in which the plants, including the plant of the corporation at Carthage, Hamilton County, Ohio, are located. The funds for the checking account for the payment of federal excise taxes for each plant are obtained through checks prepared and signed in the offices of the corporation in New York City and are drawn on funds on deposit in banks in that city. All accounts receivable of the corporation are posted in the books of the corporation kept in New York City and are payable at the offices of the corporation in New York City, where it deposits all of its receipts and moneys.

The avails of the accounts receivable when deposited by the corporation in banks in New York City are commingled with other funds of the corporation on deposit in that city, and which commingled funds are used by the corporation in the operation of its business throughout the United States, including the State of Ohio.

4. National Distillers Products Corporation is engaged principally in the business of manufacturing and distributing alcohol, whiskey and other alcoholic beverages. The corporation owns, maintains, or operates distilling or rectifying plants and plant warehouses in the States of Maryland (one plant), Pennsylvania (two plants), Missouri (one [fol. 137] plant), Kentucky (eight plants), Illinois (one plant), New Jersey (one plant) and Ohio (one plant). The plants located in the States of New Jersey and Pennsylvania are operated by subsidiary companies. Shipments of products from those plants are made for the account of and are billed by National Distillers Products Corporation. The corporation also makes shipments of its products from stocks of merchandise maintained in warehouses located in Jersey City, New Jersey, Chicago, Illinois and San Francisco and Los Angeles, California.



5. During the calendar year of 1943 the products manufactured by the appellant at its various plants were sold and distributed in all the states where such products could be legally distributed and sold.

The corporation, for the purpose of distributing and selling its products, publishes and issues and distributes two sets of price lists. One price list goes to licensees in states in which the sale and distribution of alcoholic beverages is permitted under licenses issued either by state or local governments. The conditions of sale listed in the open-state price list are the following:

#### "Conditions of Sale

1. Prices are F. O. B. Shipping Points.
2. Prices do not include State Taxes.
3. Any car requiring shipment from or to more than one point will carry a stop-over charge.
4. All orders should be forwarded to the Regional Sales Office for transmittal to New York.
5. All orders and contracts are subject to acceptance by the New York Office.
- [fol. 138] 6. All prices are subject to change without notice.
7. Terms, on approved credits. Net 30 days.
8. Freight charges will be added when brands are shipped from any point other than shown above.

#### Special Conditions Concerning Imported Products

9. We reserve the right to reduce quantities, either before or after acceptance of orders.
10. All orders for Ron Merito, accepted by us, are subject to actual arrival at Atlantic or Gulf Ports and also to delay or other conditions beyond our control.
11. Customers who place orders for Ron Merito on an F. O. B. Atlantic or Gulf Port basis must accept delivery on an L. C. L. basis from port of entry, when necessary.

The other price list is distributed to state liquor administrators or boards in the 17 states in which the distribution and sale of alcoholic beverages is a state monopoly. The conditions of sale for its products set forth in the price

list for monopoly states, including the State of Ohio, are as follows:

#### "Conditions of Sale

1. Prices are F. O. B. Shipping Points.
2. Prices do not include State Taxes.
3. Any car requiring shipment from or to more than one point will carry a stop-over charge.
4. All orders should be forwarded to New York.
5. All orders and contracts are subject to acceptance by the New York office.
6. All prices are subject to change without notice.
7. Terms. Net, 30 days from date of invoice.
8. Freight charges will be added when brands are shipped from any point other than shown above:

#### Special Conditions Concerning Imported Products

9. We reserve the right to reduce quantities, either before or after acceptance of orders.

10. All orders for Ron Merito, accepted by us are subject to actual arrival at Atlantic or Gulf ports and [fol. 139] also to delay or other conditions beyond our control.

11. Customers who place orders for Ron Merito on an F. O. B. Atlantic or Gulf Port basis must accept delivery on an L. C. L. basis from port of entry, when necessary.

6. The corporation maintains regional sales offices in various cities in the so-called open states wherein the sale and distribution of alcoholic beverages is permitted under licenses issued by either state or local governments. Sales contracts are negotiated and orders are taken for the open states at the regional sales offices. All sales contracts or orders solicited or taken through the regional sales offices are subject to acceptance or rejection at the offices of National Distillers Products Corporation in New York City. National Distillers Products Corporation does not maintain a regional sales office in Ohio. Orders received from customers in open states at regional sales offices are forwarded to New York City along with the regional sales office form, a copy of which is sent to the customer. This regional sales



office form is purely a memorandum and on it is typed the following:

"Subject to approval of New York office."

"This is not a confirmation. It is only a memorandum of order we have filed with our New York office. It is subject to their acceptance as well as ability to fill it."

These memorandum orders are received from the regional sales office and if approved and accepted, are stamped at New York City:

"Approved New York sales office."

The regional sales offices in the States of Illinois and California are allowed to deliver directly to customers [fol. 140] whose credit previously had been approved by the New York City office, products of the corporation from stocks of merchandise maintained in warehouses in those states. All accounts receivable arising from such sales and deliveries are posted in the books of the corporation in New York City and are payable at the offices of the corporation in that city.

7. Orders for its products from monopoly states, including Ohio, are forwarded directly to the offices of the corporation in New York City and are subject to acceptance or rejection at the New York City offices of the corporation.

8. After the orders, either from open states or monopoly states, are approved at the offices of the corporation in New York City, the production department, with offices located in New York City, makes up and issues shipping orders which are forwarded to the various plants throughout the United States and from which plants products of the corporation are shipped to its customers, either in open or monopoly states. The shipping orders made up and issued by the production department in New York City are based upon the orders of customers filed, accepted and approved by the company at its New York offices. The shipping orders, before they are forwarded to the various plants of the corporation, are first approved by the credit department of the corporation located in New York City. The plants are not permitted to make any shipments unless confirmed by shipping orders received from the New York office of the production department.

[fol. 141] 9. All invoices are headed:

"National Distillers Products Corporation  
120 Broadway  
New York, New York"

and a note on the customer's copy of the invoice reads:

"Make all checks payable to  
National Distillers Product Corporation  
120 Broadway  
New York, New York"

All books of accounts and evidences of accounts receivable with its customers are maintained in the office of the corporation at New York City, and all accounts receivable are supervised and followed for collection by the credit department located at 120 Broadway, New York, New York. Customers' checks in payment of accounts are received at, deposited in and cleared by banks located in the City of New York. However, if a check should be sent to either a plant or regional sales office, it is either forwarded to New York or is deposited in a special account and is subject to withdrawal only by an officer of the corporation located in its offices in New York City.

10. During the calendar year of 1943 the corporation shipped \$166,044,832.00 worth of its products from all of its plants and warehouses throughout the United States wherever manufactured. During the same year, on orders made up and issued by the office of the production department at New York City to fill orders solicited or taken by its agents or employees in states other than Ohio, the corporation shipped \$56,819,430.00 worth of its products from its plant and plant warehouses in Ohio to customers throughout the United States; that the corporation paid [fol. 142] real estate taxes on its plant and plant warehouses in Ohio and personal property taxes on its machinery, equipment and other tangible personal property in Ohio, including its products (whether in bulk or in cases) and which products subsequently were shipped from its Ohio plant warehouses to its customers in other states on orders solicited and accepted by its agents and employees in such other states.

11. During the calendar year 1943 the corporation stored in government-bonded warehouses owned and operated by



the corporation in Hamilton County, Ohio, in the process of manufacturing whiskey in barrels for the purpose of aging; that during the calendar year 1943 the corporation withdrew bulk whiskey kept in the aforesaid warehouses for the purpose of being blended, rectified and bottled to fill orders solicited and handled as set forth in paragraphs 5, 6, 7, 8 and 9 herein; that approximately ninety (90) percent of the whiskey shipped in cases from the plant of the corporation at Carthage, Ohio to customers and to warehouses of the corporation in other states was blended, rectified or bottled only upon receipt of shipping orders forwarded from the office of the corporation in New York City; that, the remaining approximately ten (10) percent of the whiskey shipped in cases from the plant of the corporation at Carthage, Ohio, to customers and to warehouses of the corporation in other states, was filled from goods shipped into Ohio from other plants of the corporation located outside of Ohio for the purpose of being transshipped from Carthage, Ohio, with other goods manufactured by the corporation at its plant at Carthage, Ohio, and that no whiskey was rectified, blended or bottled for inventory for shipping against future orders.

12. The corporation, for the tax year 1944, filed its annual report for personal property tax purposes, a true and correct copy whereof is included in the transcript of the proceedings before the appellee; that the corporation in its annual report to the state of Ohio did not allocate any of its accounts receivable to the state of Ohio; that thereafter the tax commissioner corrected said annual report by ascribing an Ohio situs to accounts receivable of \$2,996,670.00 in determining and assessing the intangible personal property tax of the corporation; that for the purpose of this appeal the corporation stipulates that 34.2191 percent of all of its accounts receivable for the calendar year 1943 arose from sales of its products which were shipped from its plant and plant warehouses in Ohio to customers throughout the United States; that said accounts receivable arose out of sales to its customers of its products manufactured in its plant in Ohio on orders solicited, received, accepted and filled as set forth in paragraphs 5, 6, 7, 8 and 9 herein; that a true and correct copy of the additional assessment certificate made and issued by the appellee is included in the transcript of the proceedings before the appellee; that the

appellee subsequently denied the application of the appellant for review and correction of the determination and assessment made by the appellee and that the action of [fol. 144] the appellee resulted in an additional intangible personal property tax in the sum of \$8,990.01 being assessed against the appellant; and that during the tax year 1944 the appellant did not pay in the State of Virginia nor in the State of New York personal property taxes on the accounts receivable involved herein and assigned an Ohio situs by the appellee.

Respectfully submitted, (S.) Isadore Topper, Attorney for Appellant. (S.) Hugh S. Jenkins, Atty. General; (S.) Daronne R. Tate, Asst. Atty. Gen., Attorneys for Appellee.

[File endorsement omitted.]

[fol. 145] BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT  
OF TAXATION OF OHIO

No. 11118

NATIONAL DISTILLERS PRODUCTS CORPORATION, Appellant,

v.

C. EMORY GLANDER, Tax Commissioner of Ohio, Appellee

DECISION—March 12, 1947

This cause and matter came on for consideration by the Board of Tax Appeals upon an appeal filed herein by the appellant, above named, from a final order of the tax commissioner denying an application theretofore filed by the appellant for the review and correction of an additional intangible personal property tax assessment in the amount of \$8,990.01 made against it for the tax year 1944. The case was heard and submitted to the Board upon said appeal, on a transcript of the proceedings before the tax commissioner relating to the additional tax assessment made against it, upon a stipulation of the facts in the case and on the briefs and arguments of counsel.

It appears from the facts thus presented that appellant is a corporation organized and existing under the laws of



the State of Virginia where its stockholders' meetings are held. The principal business of the corporation is in the City of New York where all of its executive offices are located; and all of its business activities are governed and [fol. 146] controlled from its offices in New York. All of its accounts payable were paid from funds on deposit in New York. The corporation has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton County, Ohio; and it sells its products in every state where such products may be legally sold. Pay roll checks for employees of these several plants and checks for federal excise taxes due from said plants, including the one located at Carthage, Ohio were paid with funds on deposit in banks in these several localities where such plants are located. These funds were obtained through checks drawn at the office of the corporation in New York on banks in said city. All accounts receivable were posted in the books of the corporation in the City of New York where such accounts were payable and where all of its receipts were deposited.

The accounts receivable here in question, the allocation of which resulted in the additional intangible property tax assessment complained of, arose from the sale of products manufactured by the corporation at its plant in Carthage, Ohio, which products were shipped from a stock of goods maintained by the corporation at its Carthage, Ohio, plant to points in the State of Ohio and elsewhere throughout the United States. All orders for the sale of these products were solicited by agents outside of Ohio—no such sales agents being located in this State,—which orders were forwarded to New York and were subject to acceptance or rejection by the office of the corporation in said city. When such orders were accepted by the New York office, shipping orders were forwarded from that office to the Ohio plant from which the products were shipped to points in the State of Ohio and elsewhere pursuant to such sales orders so made and accepted; and no shipments or deliveries from the Ohio plant were made except those confirmed by such shipping orders. As above indicated, all checks in payment of the purchase price of the products of the company sold by the company and delivered from its plant at Carthage, Ohio, pursuant to such sales orders, were made payable to the company at its office in New York City. In this connection it does not appear that any of the accounts receivable or of the moneys received by the com-

pany in payment of the same were used by the company in connection with its business in Ohio as distinguished from the general business of the company; but on the contrary, it does appear that such accounts receivable and the avails thereof were used by the appellant in its business generally and wherever conducted.

From the stipulation of facts filed herein it appears that during the calendar year 1943 the corporation shipped \$166,044,382.00 worth of its products from all of its plants and warehouses throughout the United States wherever manufactured; and included in the aggregate amount and value of such products were products of the amount and value of \$56,819,430.00 which, during said calendar year, were shipped from its said plant and plant warehouses in [fol. 148] Ohio to customers throughout the United States.

It appears that the appellant, in filing its annual intangible and personal property return for the tax year 1944, did not allocate any of its accounts receivable to the State of Ohio; and that thereafter the tax commissioner, on audit of said annual return, corrected the same by ascribing an Ohio situs to a part of the accounts receivable of the appellant in the sum of \$2,996,670, which accounts receivable amounting to 34.2191% of all of its accounts receivable for the calendar year 1943, arose from sales of its products which were shipped from its plant and plant warehouses in Ohio to customers throughout the United States.

The question presented in this appeal as to whether or not the tax commissioner erred in allocating said accounts receivable to the State of Ohio and in including the same as a part of the taxable property of the appellant for the tax year 1944, requires a consideration of the pertinent provisions of section 5328-1 and 5328-2, General Code. Section 5328-1, General Code, which is the declaratory section with respect to the taxation of intangible property, provides generally that all moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in said section or as otherwise provided or exempted in the title of which this section is a part. This section further provides as follows:

“Property of the kinds and classes mentioned in section 5328-2 of the General Code (including accounts



receivable), used in and arising out of business trans-  
 [fol. 149] acted in this state by, for or on behalf of a  
 nonresident person . . . shall be subject to taxa-  
 tion; and all such property of persons residing in this  
 state used in and arising out of business transacted  
 outside of this state by, for or on behalf of such persons  
 . . . shall not be subject to taxation."

Section 5328-2, General Code, provides:

"Property of the kinds and classes herein mentioned,  
 when used in business, shall be considered to arise out  
 of business transacted in a state other than that in  
 which the owner thereof resides in the cases and under  
 the circumstances following:

"In the case of accounts receivable, when resulting  
 from the sale of property sold by an agent having an  
 office in such other state or from a stock of goods  
 maintained therein, or from services performed by  
 an officer, agent or employe connected with, sent from,  
 or reporting to any officer or at any office located in  
 such other state. . . ."

This Section further provides as follows:

"The provisions of this section shall be reciprocally  
 applied, to the end that all property of the kinds and  
 classes mentioned in this section having a business situs  
 in this state shall be taxed herein and no property of  
 such kinds and classes belonging to a person residing  
 in this state and having a business situs outside of this  
 state shall be taxed. It is hereby declared that the  
 assignment of a business situs outside of this state to  
 property of a person residing in this state in any case  
 and under any circumstances mentioned in this section  
 is inseparable from the assignment of such situs in this  
 state to property of a person residing outside of this  
 state in a like case and under similar circumstances.  
 If any provision of this section shall be held invalid as  
 applied to property of a non-resident person, such  
 decision shall be deemed also to affect such provision  
 as applied to property of a resident, but shall not  
 affect any other provision hereof."

Section 5325-1, General Code, which defines the term "used in business" in connection with the taxation of [fol.150] tangible and intangible personal property, provides, among other things, as follows:

"Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Referring to the above quoted statutory provisions and, particularly, to the provision of section 5328-2, General Code, that "the provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this State shall be taxed herein and no property of such kinds and classes belonging to a person residing in this State and having a business situs outside of this State shall be taxed", it may be observed that these statutory provisions indicate a policy to treat, so far as possible, domestic corporations and other residents of this State on one hand, and foreign corporations and other nonresidents on the other hand, on a basis of equality with respect to the taxation of business intangibles. Although the term "business situs", as used in the above quoted provision of section 5328-2, General Code, is not therein further defined, we are admonished in and by the decision of the Supreme Court of this State in the case of *The Ransom & Randolph Company v. Evatt, Tax Commr.*, 142 O. S. 398,408, that section 5328-2, General Code, fixes the business situs of accounts receivable [fol.151] and other classes of intangible property therein referred to, and that, for this purpose, effect is to be given to this statute rather than to any general rule which might otherwise be applicable to cases of this kind.

On the consideration of the case of *The Ransom & Randolph Company v. Evatt*, when the same was before the Board of Tax Appeals for decision, 25 O. O. 253, which case involved the question as to the taxable situs of the accounts receivable of an Ohio corporation which arose in the transaction of the business of the company in the States of Indi-



ana and Michigan, this Board was required to construe and apply the statutory provisions above quoted and particularly the provision of section 5328-1, General Code, that "all such property (accounts receivable and other kinds and classes of intangible property mentioned in section 5328-2, General Code) of persons residing in this State used in and arising out of business transacted outside of this State by, for or on behalf of such persons, . . . shall not be subject to taxation". On a consideration of the statutory provisions above noted, the Board of Tax Appeals was of the view that before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicile of the taxpayer, it must appear that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other state, but were therein so used as to become an integral part of the business carried on in such other state; and that it was not sufficient that such accounts receivable and other intangible property be used in business generally by the taxpayer. And on this view the Board held that the accounts receivable there in question, although they arose in the conduct of taxpayer's business in the States of Indiana and Michigan, did not have a business situs in such states, and that such accounts receivable were taxable in Ohio.

On the appeal of the decision of the Board of Tax Appeals in The Ransom & Randolph Co. case to the Supreme Court of Ohio, that Court reversed the decision of the Board of Tax Appeals upon the point above indicated. 142 O. S. 398, 404. That Court, upon consideration of the applicable provisions of section 5328-2 and related sections of the General Code above noted, held that the accounts receivable of a taxpayer which arose in the conduct of its business in a state or states other than the state in which it had its domicile or place of residence, had a business situs in such other state or states if such accounts receivable or the avails thereof are being applied or are intended to be applied in the conduct of the taxpayer's business, whether in this State or elsewhere. This view of the Supreme Court as to the construction to be placed upon the statutory provisions here in question was later followed by that Court in its decisions in the cases of The Haverfield Company v. Evatt, Tax Commr., 143 O. S. 58, and National Cash Register Company v. Evatt, Tax Commr., 145 O. S. 597.

[fol. 153] The appellant, as a corporation organized and existing under the laws of the State of Virginia, is a legal resident of that state; and as to the appellant corporation the State of Ohio is "a state other than that in which the owner thereof resides" and "such other state" within the provisions of section 5328-2, General Code, fixing the status of accounts receivable and other tangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this State, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this Board hereby find—, in the conduct of its business in the State of Ohio by the sale of its products from a stock of goods located in this State, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this State or elsewhere, such accounts receivable have a business and taxable situs in the State of Ohio, as found and determined by the tax commissioner.

With respect to a question such as that here presented, to wit, that as to the taxation of the accounts receivable of a foreign corporation arising in the conduct of its business in this State, the application of the above noted provisions of sections 5328-1, 5328-2 and other related sections of the General Code, as the same have been construed by the Supreme Court, presents, to our mind, a serious question as to the constitutionality of said statutory provisions as so construed under the Due Process of Law clause of [fol. 154] the Federal Constitution. However, as to this, it is fair to state that recently the Supreme Court of the State of Georgia in the case of *Parke, Davis & Co. v. Atlanta*, 200 Ga. 296, 163 A.L.R. 976, 36 SE (2d) 773, sustained a tax under the laws of that state on the accounts receivable of a foreign corporation which arose from the sale and delivery of its products from a stock of goods in the City of Atlanta in said state. The decision of the court on this point, as indicated by the syllabi in the report of such decision, is as follows:

"Where a foreign corporation kept a stock of goods in a warehouse in the City of Atlanta, Ga., orders were received and approved outside the state, which were filled by delivering goods from the warehouse to



resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the City of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by the non-resident owner, for the merchandise sold in the municipality, are passed upon as to the credit of customers, and the books of account are kept, at a point without the City of Atlanta and the State of Georgia.

"Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment on the Constitution of the United States, or paragraphs 2 and 3 of section 1 in article 1 of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon, and the books of account kept by the corporation at a point without the state."

[fol. 155] With respect to the constitutional aspects of the question here presented, the case of Parke, Davis & Co. v. Atlanta, *supra*, cannot be distinguished on the facts from the case at bar; for in that case, as in this, the accounts receivable which arose in the conduct of the taxpayer's business in the taxing state were not used otherwise than in the transaction of the taxpayer's business generally and as a whole.

Whatever the answer may be as to the constitutionality of the above quoted provisions of section 5328-1, 5328-2 and related sections of the General Code, as the same have been heretofore construed by the Supreme Court of this State, in their application to the facts of this case, it is quite clear that the Board of Tax Appeals, as an administrative and quasi judicial board or tribunal, has no jurisdiction and authority to consider and determine such constitutional question. See *Hillsborough Township v. Cromwell*, U. S. Sup. Ct., Case No. 197, 90 L. Ed. 298, 302; *Schwartz v. Essex County Board of Taxation*, 129 N.J.L.

129, 132, affirmed 130 N.J.L. 177. In the case last above cited it was said:

"It is undisputable that the determination of the constitutionality of an act of the legislature rests with a judicial body; not with a quasi judicial body such as the State Board of Tax Appeals. The final responsibility to pass upon the constitutionality of a given piece of legislation rests in the courts and it is the duty of the various state agencies and administrative bodies to accept a legislative act as constitutional until such time as it has been declared to be unconstitutional by a qualified judicial body."

[fol. 156] The Board of Tax Appeals is, of course, bound by the above cited decisions of the Supreme Court of this State construing the above quoted statutory provisions as to the business situs of accounts receivable and other intangible property; and in this view the assessment and order of the tax commissioner complained of in this appeal is hereby affirmed.

Whereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

Edward J. Kirwin, Secretary.

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[fols. 157-158] Clerk's certificate to foregoing transcript omitted in printing.



[fol. 159] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD—  
Filed December 6, 1948

Comes now the appellant in the above entitled cause and adopts its respective assignments of error as its statement of the points to be relied upon, and states that the whole of the record as filed is necessary for the consideration of the case.

National Distillers Products Corporation, Appellant,  
by Isadore Topper, 17 South High Street, Columbus 15, Ohio, Its Attorney.

Service upon the undersigned of the foregoing statement of points and designation of parts of record is acknowledged this 2d day of December, 1948.

C. Emory Glander, Tax Commissioner, State of Ohio,  
Appellee; Aubrey A. Wendt, Assistant Attorney  
General, State of Ohio, Counsel for Appellee.

[fol. 160] -[File endorsement omitted.]

[fol. 161] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 3, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: File No. 53,450. Ohio, Supreme Court. Term No. 448. National Distillers Products Corporation, New York, Appellant, vs. C. Emory Glander, Tax Commissioner of Ohio. Filed December 6, 1948. Term No. 448 O. T. 1948.

business" transacted outside of Ohio, and (2) that accounts receivable of a non-resident shall be subject to taxation in Ohio "when used in and arising out of business" transacted in Ohio, the Supreme Court of Ohio held in the case of *Ransom & Randolph Co. v. Evalt*, supra, that (pp. 407, 408, 409) to acquire a business situs outside of Ohio it is not necessary that accounts receivable be used principally in a state other than Ohio but that it is sufficient "if they or the avails thereof are being applied or intended to be applied in the conduct of the business, whether in this state or elsewhere", and arise from the sale of property sold by an agent having an office in a state other than Ohio or from the sale of property sold from a stock of goods maintained in a state other than Ohio. In other words, as they apply to accounts receivable of a resident of Ohio, Sections 5328-1 and 5328-2, General Code, do not require as a prerequisite of out of state situs that accounts receivable be integrated in a business in a foreign state, but require only that the receivables arise out of business done in a foreign state and be used generally in the business of the owner. Conversely, with respect of the accounts receivable of a non-resident, the statutes in question only require that the receivables arise out of business transacted in Ohio and be used generally in the business of the owner, whether in Ohio or elsewhere. Since accounts receivable arising out of an interstate business, or the proceeds from them, will inevitably be applied to the purposes of the business somewhere, the sole test of taxability prescribed by the state statutes is the place where the accounts arise.

Applying the statutes, as so construed, to the facts of the instant case, both the Tax Commissioner and the Board of Tax Appeals found that appellant's receivables, or the avails thereof, were being applied in the conduct of appellant's business in Ohio and elsewhere and arose from the sale of property sold from a stock of goods maintained in



Ohio, thereby becoming subject to taxation in Ohio. In this connection, the order made by the Tax Commissioner reads as follows (Record, p. 4):

"It is the holding of the tax commissioner that the receivables as allocated to Ohio in the computation of credits did result from the sale of property from a stock of goods maintained within this state \* \* \*";

and the journal entry of the Board of Tax Appeals recites that (Record, p. 15):

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state and, consequently, are taxable here."

Before the Board of Tax Appeals, appellant contended (1) that the fact that the avails of its receivables were applied indiscriminately to the general purposes of its business, in Ohio and elsewhere, and arose from sales of products manufactured in Ohio does not confer jurisdiction to tax the property upon the state of Ohio; and (2) that the statutes, as construed and applied to the agreed facts of this case, discriminate against appellant and in favor of domestic corporations similarly situated. Appellant pointed out that, as applied, the statutes subject its receivables to taxation in Ohio because they arose from the sale of property from a stock of goods maintained in Ohio, whereas, if appellant were a domestic corporation, the same receivables would be exempted from taxation in Ohio because they arose from sales made by an agent having an office in a state other than Ohio. Appellant maintained that the statutes are repugnant to the Fourteenth Amendment as so construed and applied, and pointed out that the vice inherent in this construction of the statutes is that it ignores the unequivocal requirement of Section 5328-1, General Code, that intangible

property of a non-resident must be used in business in Ohio as well as arise out of business in Ohio before it becomes subject to taxation in the state.

Appellant appealed from the decision of the Board of Tax Appeals to the Supreme Court of Ohio and in its notice of appeal assigned, among others, the following errors in the decision of the Board as grounds for reversal:

“1. It affirms the action of appellee in assessing an ad valorem tax in respect of intangible property of appellant, a foreign corporation not having a commercial domicile in Ohio, notwithstanding that the property, consisting of accounts receivable and pre-paid items, was never in Ohio and did not have a business situs in Ohio. The assessment, therefore, is invalid, and collection of the tax assessed would (a) burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and (b) deprive appellant of its property without due process of law and deny appellant the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States.

2. It construes Sections 5328-1 and 5328-2 of the General Code of Ohio, as applied to the stipulated facts of this case, to require the assessment of appellant's aforesaid property for taxation in Ohio. As so construed and applied, said statutes are unconstitutional because (a) they burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and (b) deprive appellant of its property without due process of law and deny appellant the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States.

3. The intangible property of appellant is not taxable in Ohio under Ohio law, because it did not have a



business situs in Ohio and did not arise out of and was not used in business in this state.

4. There is no evidence in the record to support the Board of Tax Appeals' decision that appellant's accounts receivable resulted from sales of property from a stock of goods maintained in Ohio."

The Supreme Court affirmed the decision of the Board of Tax Appeals on August 4, 1948 and on October 6, 1948 denied appellant's application for rehearing which was filed on August 17, 1948.

### 5. Substantiality of the Questions Involved

A. The question raised by appellant's contention that the statutes in question violate the due process clause of the Fourteenth Amendment to the Constitution of the United States involves the jurisdiction of a state to tax the intangible property of a non-resident.

The Supreme Court of the United States has held that a state has the power to assess an *ad valorem* tax against credits belonging to a non-resident if the property acquires a business situs within the state (*New Orleans v. Stemple*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *State Assessors v. Comptoir National D'Escompte*, 181 U. S. 388; *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U. S. 346), but whether or not business situs exists is a matter of proof of the integration of the intangibles with a local business conducted by their owner within the state. *Wheeling Steel Corp. v. Fox*, 298 U. S. 193; *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234. Referring to these cases, it is said in the case of *Newark Fire Insurance Co. v. Board of Tax Appeals*, 307 U. S. 313, in the opinion announced by Mr. Justice Reed and concurred in by the Chief Justice, Mr. Justice Butler and Mr. Justice Roberts, that (319, 320):





"Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than that of the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. \* \* \*

"To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity."

Appellant earnestly contends that there is no evidence in the record in this case of a factual connection between the intangibles in question and the state of Ohio such as to confer jurisdiction upon the state to assess an ad valorem tax against the property under the theory of business situs or otherwise, and respectfully submits that it is within the province of the Supreme Court of the United States to inquire whether there is such evidence. In this regard it is stated in the opinion of the Court in the case of *Beidler v. South Carolina*, 282 U. S. 1, that (8):

"\* \* \* a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

To the same effect is the statement made in the opinion announced by Mr. Justice Reed in the *Newark Fire Insurance Co. Case* (319), *supra*:

"In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a Federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court."

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<i>New Orleans v. Stemple</i> , 175 U. S. 309	13

The state of Ohio bases its claim of right to tax appellant's receivables solely upon the fact that they resulted from sales of products manufactured by appellant in its Ohio plants. This contention finds a ready answer in the opinion of the court in the case of *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, a case involving the question of a business situs for taxation of accounts receivable which were created, applied and extinguished under precisely the same circumstances as the receivables involved in the instant case, viz (212, 213):

"The question here is not of the taxation of the plants in other states. The real estate, equipment and all tangible property there located is taxable by those States respectively. The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned.

\* \* \* Such a tax on net gains is distinct from an ad valorem property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and



<i>Ransom &amp; Randolph Co. v. Evatt</i> , 142 O. S. 398	Page 7, 8, 20
<i>Southern Railway Co. v. Green</i> , 216 U. S. 400	19
<i>State Assessors v. Comptoir National D'Escompte</i> , 181 U. S. 388	13
<i>Utah v. Aldrich</i> , 216 U. S. 174	16
<i>Wheeling Steel Corp. v. Fox</i> , 289 U. S. 193	4, 13, 15, 17
<i>Wisconsin v. J. C. Penney Co.</i> , 311 U. S. 435	17

## STATUTES CITED

## Constitution of the United States:

Article I, Section 8	23
14th Amendment	13

## General Code of Ohio:

Section 5325-1	2, 9
Section 5327	4
Section 5328	17
Section 5328-1	7, 8, 9, 10, 11, 12, 19, 20, 21, 22
Section 5328-2	2, 7, 8, 10, 12, 19, 20, 21, 22
Section 5495	17, 19
Section 5499	17, 19
Section 5638	3

## United States Code, Title 28:

Section 1257	1
Section 2101	4
Section 2104	4

these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

"Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of ad valorem property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale."

In *Wheeling Steel Corp. v. Fox*, supra, the facts with regard to the management of appellant's business, the location of its factories and sales offices, and the creation, custody and place of payment of its accounts receivable were the same as the facts in the present case. However, there appellant had returned for taxation in West Virginia only that part of its accounts receivable which had resulted from sales to West Virginia residents of products manufactured in that state and had returned for taxation in Ohio the accounts resulting from sales to residents of Ohio of products manufactured in that state. All of the accounts were held to be taxable in West Virginia and, while the court did not pass upon Ohio's jurisdiction to tax a part of the receivables, the opinion is clearly to the effect that the fact that goods are manufactured in a particular state is not sufficient to confer jurisdiction upon that state to tax receivables resulting from sales of the goods.

It cannot be said that the state of Ohio conferred some benefit or protection upon appellant with respect of the intangibles in question for which it was entitled to make an exaction. Cf. *Utah v. Aldrich*, 316 U. S. 174. Appellant owned and operated manufacturing plants in Ohio and, because of the benefits, opportunities and protection afforded

SUPREME COURT OF OHIO

No. 31079

WHEELING STEEL CORPORATION,

*Appellant,*

*vs.*

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,

*Appellee*

**JURISDICTIONAL STATEMENT**

Appellant, Wheeling Steel Corporation, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

**1. Statutory Provision Sustaining Jurisdiction**

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Title 28, United States Code, Section 1257 (Pub. L. No. 773, 80th Cong. 2d. Sess.), reading, to the extent relevant here, as follows:

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

2. By appeal, where is drawn in question the validity of a statute of any state on the ground of its being re-



to it and its property by the state, appellant was subject to the franchise tax<sup>3</sup> imposed by the state of Ohio upon foreign corporations for the privilege of doing business, and its lands, plants, machinery, office equipment, inventories of materials and stocks of completed products situated in the state were subject to Ohio's property tax laws. Appellant's notes and accounts receivable became effective by action taken at its Wheeling office and there the receivables were kept and the required payments were made (*Wheeling Steel Corp. v. Fox*, supra, 298 U. S. 193, 212). There were no conceivable benefits or protection conferred upon appellant with respect of this property by the state of Ohio. Under similar circumstances it was said in the opinion of the court in the case of *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, that:

“(80) \* \* \* the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition; we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.”

It has been said that (*Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444) “a state is free to pursue its own fiscal poli-

<sup>3</sup> Sections 5495 and 5499, General Code.

<sup>4</sup> Section 5328, General Code.

pugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

## 2. State Statutes the Validity of Which Is Involved

The statutes of the state of Ohio, the validity of which has been sustained by a final judgment of the Supreme Court of Ohio, the highest court of said state, as not being violative of or repugnant to the Constitution of the United States are Sections 5328-1 and 5328-2 of the General Code of Ohio.<sup>1</sup> These statutes, as construed and applied by the Supreme Court of Ohio in this case, authorize and require the assessment for taxation in Ohio, as items of property, the accounts receivable of a non-resident of the state on the sole ground that the receivables can be traced back to the sale of goods manufactured in Ohio. The pertinent provisions thereof are the following:

"Section 5328-1: \* \* \* Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, \* \* \* shall be subject to taxation; and all such property of persons residing in this state used in, and arising out of business transacted outside of this state by, for or on behalf of such persons \* \* \* shall not be subject to taxation \* \* \*"

"Section 5328-2: Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an

<sup>1</sup> There is no official edition of the General Code of Ohio. Sections 5328-1 and 5328-2, General Code, appear on pages 17, 18 and 19 of Page's Ohio General Code Annotated, Volume 4A and at page 9, Throckmorton's Ohio Code Annotated, Volume 1, Part Second, 1940 ed.

office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

In the case of prepaid items, when the right acquired thereby relates exclusively to the business to be transacted in such other state, or to property used in such business.

. . . . .

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property to a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. \* \* \*

The statute under which intangible property is taxed is Section 5638, General Code, which reads as follows:

“Section 5638: Annual taxes are hereby levied on the kinds and classes of intangible property, herein after enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to wit:

Investments, five per centum of income yield or of income as provided by Section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar, \* \* \*.”



The word "credits", as used in the foregoing statute, is defined in Section 5327, General Code, as follows:

"Section 5327: The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. . . ."

### 3. Dates of Judgment and Appeal

The date of the judgment of the Supreme Court of Ohio which is sought to be reviewed is August 4, 1948. Appellant filed an application for rehearing on August 17, 1948, which was denied on October 6, 1948. The judgment became final on October 6, 1948. The time for taking the appeal began to run on the date of the denial of the application for a rehearing, to wit, on October 6, 1948. *Dept. of Banking v. Pink*, 317 U. S. 264, 266.

The date on which the application for appeal was presented is November 1, 1948.

Under the provisions of Title 28, United States Code, sections 2101 and 2104, appellant may bring its appeal within ninety days after the entry of the final judgment of the Supreme Court of Ohio.

### 4. Nature of the Case and Rulings Below

This case originated before the Tax Commissioner of Ohio, appellee, who assessed an ad valorem property tax against certain notes and accounts receivable and prepaid premiums on insurance policies owned by appellant, a Delaware corporation, having its commercial domicile in West Virginia (*Wheeling Steel Corp. v. Fox*, 289 U. S. 193), over and against appellant's objection that its property was not

within the territorial jurisdiction of the state of Ohio. The assessment was affirmed successively by the Board of Tax Appeals and the Supreme Court of Ohio. At every stage in the proceedings appellant drew in question the validity of the statutes under the authority of which the assessment was made, upon the ground of their being repugnant to the Constitution of the United States.

The facts of the case were stipulated by counsel for the parties. In essence; they are that at all times mentioned in the stipulation appellant was a Delaware corporation engaged in the business of manufacturing and selling steel and steel products. Its principal business office was located in Wheeling, West Virginia, where its officers had their offices and its stockholders' and directors' meetings were held. The books and general accounting records of the corporation were kept at the Wheeling office and all of its money, securities, notes and other valuable effects were in the custody of its treasurer whose office was there.

Appellant had eight manufacturing plants, four of them in West Virginia and four in Ohio, and maintained fourteen sales offices in thirteen states, one of the offices being located in Ohio.

Orders for appellant's products were taken at the sales offices subject to acceptance at the Wheeling office. Credit was extended to purchasers and the terms thereof fixed only at the Wheeling office where all notes and accounts receivable arising out of sales of appellant's products were payable. Records of the accounts and the notes themselves were kept at Wheeling and, when paid, the avails of the notes and accounts were under the control of the corporation's treasurer and were applied, indiscriminately, to the general purposes of the business, in Ohio and elsewhere. The sales offices had no powers or duties with respect of the custody or collection of the notes and accounts.

Appellant maintained balances in banks situated in the same localities as its plants and payroll checks were drawn at the various plants on these local bank accounts. All commercial and other accounts payable were paid by checks drawn and issued at the Wheeling office.

Blanket insurance policies covering the corporation's properties in West Virginia, Ohio and other states were negotiated, delivered, paid for and kept at the Wheeling office.

In addition to the foregoing stipulated facts, the record shows that in its personal property tax return for the year 1942, appellant listed the balances in Ohio banks which it used to meet the payrolls of its Ohio plants as its only intangible property subject to taxation in Ohio but appellee assessed for taxation in Ohio that part of appellant's notes and accounts receivable resulting from sales of products manufactured in the Ohio plants. It was stipulated that the greater part of these receivables, in dollar value, resulted from sales of products which were manufactured after the receipt of specific orders from the purchasers and had not been stocked at the Ohio plants to fill any orders that might be received; and that only the smaller part of the receivables had resulted from sales of products which had been manufactured prior to the receipt of orders and kept on hand at the Ohio plants to fill any orders which might be received. It was also stipulated that some of the orders from which the receivables in question eventuated were sent directly by the customers to the principal office of appellant at Wheeling and there accepted, while other orders were received at the various sales offices and forwarded to the Wheeling office for acceptance. Appellee also assessed for taxation in Ohio that part of appellant's prepaid insurance premiums which were prepaid with respect of insurance on the Ohio plants. It was stipulated that both the receivables and prepaid insurance premiums



had been assessed for taxation in West Virginia for the year 1942. Nevertheless, the Supreme Court of Ohio decided that the state of Ohio had jurisdiction to tax the receivables that could be traced to sales of products manufactured in Ohio and insurance premiums prepaid with respect to insurance on the Ohio plants.

The assessment was made under the purported authority of sections 5328-1 and 5328-2, General Code, and appellant contended orally before the Tax Commissioner that the intangibles in question did not have a business situs in Ohio, that the state of Ohio lacked jurisdiction to tax them, and that the statutes in question, if construed and applied so as to subject the property to taxation in Ohio, would violate the Fourteenth Amendment to the Constitution of the United States. To this objection appellee said in his final order (Record, p. 2) dated December 26, 1944, assessing the tax:

“As to such contention the tax commissioner holds that he is without authority to set aside acts of the legislature on constitutional grounds, and further, it is the position of the tax commissioner that the assessment as herein ordered is in every respect proper in view of the decision of the Ohio Supreme Court in the case of *Ransom & Randolph v. Evatt*, 142 O. S. 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2 General Code.”

Appellant appealed from the final order of the Tax Commissioner to the Board of Tax Appeals of Ohio and, by assignment of error, renewed its contention that the statutes in question, as construed and applied, violate the Fourteenth Amendment to the Constitution of the United States. The Board of Tax Appeals affirmed the Tax Commissioner and, as to the validity of the statutes and the basis of its decision, said in its journal entry (Record, p. 7) dated April 7, 1947:

“In the above two cases [*Ransom & Randolph Co. v. Evatt*, 142 O. S. 398 and *Haverfield Co. v. Evatt*,

143 O. S. 58] no constitutional question was involved since the state would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes [Sections 5328-1 and 5328-2, General Code], therefore, the rule adopted by the Supreme Court must be applied to non-residents. It is claimed, however, that to apply this rule to non-residents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this board has no right to declare a statute unconstitutional. \* \* \* As stated before, this board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court."

The construction of Sections 5328-1 and 5328-2, General Code, which is referred to by the Tax Commissioner and the Board of Tax Appeals as having been adopted by the Supreme Court of Ohio in the case of *Ransom & Randolph Co. v. Evatt*, 142 O. S. 398 is that the receivables of a domestic corporation are exempt from taxation in Ohio under the following conditions:

1. if they are used in business, and
2. if they either (a) arise from the sale of property sold by an agent having an office in a state other than Ohio; or  
(b) arise from the sale of property from a stock of goods maintained in a state other than Ohio; or  
(c) \* \* \* (not applicable) \* \* \* (Section 5328-2, General Code).

This construction is set forth in the syllabus<sup>2</sup> in the *Ransom & Randolph Company Case* as follows:

"2. Section 5328-2, General Code, fixes the business situs of accounts receivable. When such receivables

<sup>2</sup> The syllabus of a decision of the Supreme Court of Ohio is prepared by the Judge assigned to write the opinion, and in all cases re-

are used in business and result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, such receivables shall be considered, for the purpose of taxation, to have arisen out of business transacted in a state other than that in which the owner thereof resides. The provisions of such section are to be reciprocally applied to the end that all accounts receivable having a business situs in this state shall be taxed in Ohio and no such property belonging to a resident of this state and having a business situs outside of this state shall be taxed in Ohio":

In the opinion of the Court in the same case it is said that (p. 408):

"The only statutory conditions for out-of-state situs of accounts receivable [of a resident of Ohio] are that they shall be used in business and shall result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein [Section 5328-2, General Code]."

With respect of the requirement that accounts receivable be "used in business", Section 5325-1, General Code, provides that:

"Sec. 5325-1: \* \* \* Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. \* \* \*"

Although Section 5328-1, General Code, provides (1) that accounts receivable of an Ohio resident shall not be subject to taxation in Ohio "when used in and arising out of

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ceives the assent of a majority of the Court. It is the rule, therefore, that the syllabus states the law with reference to the facts upon which it is predicated. *The Baltimore & Ohio Railway Co. v. Baillie, et al.*, 112 O. S. 567, 570.



cies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded and to benefits which it has conferred by the fact of being an orderly, civilized society", and that in determining the jurisdiction of a state to tax, "the simple but controlling question is whether the state has given anything for which it can ask return."

In the present case appellant contends that the state of Ohio has given appellant nothing with respect of the intangibles in question for which the state is entitled to ask a return and, therefore, lacks jurisdiction to tax the property.

B. The question raised by appellant's contention that the statutes in question violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States involves the right of a state to assess an ad valorem tax against property of a foreign corporation and to exempt identical property of a domestic corporation from taxation.

In the case of *Hanover Fire Insurance Co. v. Harding*, 272 U. S. 494, the Supreme Court of the United States held that a foreign corporation, having secured the right to do business in a state by the payment of the charge exacted by the state from non-residents for that privilege, was entitled to stand equal and be classified with domestic corporations of the same kind. In this regard, it is said in the opinion of the Court that (510):

"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn upon the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and

other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

To the same effect is the following language appearing in the opinion of the Court in the case of *Hillsborough Township v. Cromwell*, 326 U. S. 620, at page 623:

"The equal protection clause of the 14th Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is to equal treatment."

Appellant contends that Sections 5328-1 and 5328-2, General Code, as applied in this case, select appellant for discriminatory treatment by subjecting its property to taxation and exempting from taxation identical property of domestic corporations of the same class as appellant, and that the decision of the Supreme Court of Ohio in favor of the validity of the statutes, as so applied, is contrary to applicable decisions of the Supreme Court of the United States. Cf. *Concordia Fire Insurance Co. v. Illinois*, 292 U. S. 535; *Southern Railway Co. v. Green*, 216 U. S. 400.

The tax involved in this case is a property tax. It is not a charge imposed upon foreign corporations for the privilege of doing business in Ohio. For that privilege, the state of Ohio assesses a franchise tax<sup>5</sup> against foreign corpo-

<sup>5</sup> Sections 5495 and 5499, General Code.

rations and appellant was subject to that tax. Appellant, therefore, is entitled to equality of treatment from the state of Ohio with domestic corporations of the same class.

Appellant's complaint in this regard is that under the statutes in question its notes and accounts receivable which resulted from the sale of products which it manufactured in Ohio and sold in West Virginia are taxable in Ohio, whereas the same receivables, if resulting from the sale of products manufactured in Ohio and sold in West Virginia by an Ohio corporation would be exempt from taxation in Ohio. Appellant contends that this is discriminatory treatment, prohibited by the Fourteenth Amendment.

In the case of *Ransom & Randolph Company v. Evatt*, 142 O. S. 398, the Supreme Court of Ohio decided that under Sections 5328-1 and 5328-2, General Code, the accounts receivable of an Ohio corporation are exempt from taxation in Ohio if they are used in business and result from the sale of property sold (a) by an agent having an office in a state other than Ohio, or (b) from a stock of goods maintained in a state other than Ohio. In the present case the Board of Tax Appeals decided that under the same statutes, accounts receivable of a foreign corporation are subject to taxation in Ohio if they are used in business and result from the sale of property sold (a) by an agent having an office in Ohio, or (b) from a stock of goods maintained in Ohio, and the Supreme Court of Ohio affirmed the decision of the Board.

So construed, the statutes in question discriminate against foreign corporations and in favor of domestic corporations. A domestic corporation may maintain a stock of goods in Ohio and sell the goods through an agent having an office in another state or it may maintain a stock of goods in another state and sell the goods through an agent having an office



in Ohio and in either case receivables arising from the sales are exempt from taxation in Ohio: but if a foreign corporation conducts its business in exactly the same manner as the Ohio corporation, maintaining a stock of goods in Ohio and selling the goods through an agent having an office in a state other than Ohio, or maintaining a stock of goods in a state other than Ohio and selling the goods through an agent having an office in Ohio, then, in either case, receivables arising from the sales are taxable in Ohio.

In the present case, the Board of Tax Appeals found that the receivables in question arose from sales from a stock of goods maintained in Ohio and under Sections 5328-1 and 5328-2, General Code, were subject to taxation in Ohio. The Supreme Court of Ohio affirmed the Board's decision. Appellant contended that there was no evidence in the record that the receivables in question resulted from sales from a stock of goods maintained in Ohio and pointed to the stipulation that products shipped from appellant's Ohio manufacturing plants to fill the orders from which the greater part of these receivables had resulted, were manufactured after the receipt of the orders and that only the lesser part of the receivables had resulted from the sale of products which had been manufactured prior to the receipt of orders and kept on hand at the Ohio plants to fill any orders that might be received. However, assuming that the receivables had resulted from sales from a stock of goods maintained in Ohio, the evidence is that they also resulted from sales made by an agent having an office in a state other than Ohio, and for that reason, if appellant had been a domestic corporation, the receivables would have been held to be exempt from taxation in Ohio.

Appellant submits that there is no basis for the distinction made between its property and the property of a domestic corporation similarly situated and that Sections

5328-1 and 5328-2, General Code, violate the equal protection cause of the Fourteenth Amendment.

C. The question raised by appellant's contention that Sections 5328-1 and 5328-2, General Code, violate the due process clause of Section 8, Article I of the Constitution of the United States involves the right of a state to tax receipts from activities in interstate commerce carried on beyond the borders of the state and, thereby, to subject the property to the risk of multiple taxation to which local commerce is not exposed.

Appellant contends that the decision of the Supreme Court of Ohio that Sections 5328-1 and 5328-2, General Code, as applied in this case, do not violate the commerce clause is in conflict with the decisions of the Supreme Court of the United States in the cases of *Gwin, White & Prince v. Henneford*, 305 U. S. 434, and *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307.

It was held in *Gwin, White & Prince v. Henneford*, *supra*, that a state tax which, though nominally local, discriminates against interstate commerce by imposing upon it the risk of a multiple burden to which local commerce is not exposed is precluded by the commerce clause. In *J. D. Adams Mfg. Co. v. Storen*, *supra*, a state tax on gross receipts from interstate commerce was held to be invalid because it constituted a direct burden on the commerce. In the opinion of the Court it is said that (p. 311):

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce

is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution."

The tax involved in the present case, while purporting to be a property tax, is actually a tax on receipts from activities in interstate commerce carried on outside of Ohio. The state of Ohio does not claim, nor is there any evidence in the record, that the receivables in question were integrated with appellant's manufacturing operations or its sales office in Ohio, or that the state had conferred some benefit, privilege or protection upon appellant with respect of the receivables so as to confer jurisdiction upon the state to tax the receivables as property.

The most that can be said as to the factual connection between the state of Ohio and the receivables in question is that they can be traced to sales of products manufactured in Ohio. It is stipulated that the sales were made by taking orders from prospective purchasers at the various sales offices subject to acceptance at appellant's principal office in Wheeling, West Virginia, which alone had the power to extend credit to purchasers. Other orders were sent directly to the Wheeling office by customers and were accepted there. All evidences of the notes and accounts receivable resulting from the sales were kept and controlled at the Wheeling office where they were payable.

The right of the state of Ohio to tax all of the receivables that can be traced to sales of products manufactured in Ohio has been affirmed by the Supreme Court of Ohio and if Ohio can tax these receivables because of this remote connection with them, then each of the states in which appellant maintained a sales office would have an equal right to tax the receivables that could be traced to the orders taken within its borders. All of the receivables are subject



to taxation in Delaware, the state of domicile of appellant (*Curry v. McCanless*, 307 U. S. 357, 368), and taxes on them have been paid to the state of West Virginia, the commercial domicile of the corporation (*Wheeling Steel Corp. v. Fox*, *supra*).

Appellant contends, therefore, that, as construed, the statutes impose a tax on receipts derived from sales made outside of Ohio in interstate and that, if lawful, the tax can be duplicated by other states. Appellant contends, further, that interstate commerce would thus be subjected to a double tax burden to which intrastate commerce is not exposed.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Section 1257 of Title 28 of the United States Code.

DARGUSCH, CAREN, GREEK AND KING,

CARLTON S. DARGUSCH,

JOHN CAREN,

*Attorneys for Appellant,*

*Wheeling Steel Corporation.*

## APPENDIX A

## SUPREME COURT OF OHIO

NATIONAL DISTILLERS PRODUCTS CORP., *Appellant*,

v.

GLANDER, Tax Commr., *Appellee*.NATIONAL DISTILLERS PRODUCTS CORP., *Appellant*,

v.

EVATT, Tax Commr., *Appellee*,WHEELING STEEL CORP., *Appellant*,

v.

GLANDER, Tax Commr., *Appellee*.UNITED STATES GYPSUM CO., *Appellant*,

v.

EVATT, Tax Commr., *Appellee*. (Two Cases.)

*Taxation—Corporation franchise and intangible personal property—Foreign corporation maintained Ohio plants which completed orders sold—General books kept and orders accepted at principal office outside Ohio—Accounts receivable or avails thereof used in business generally—Prepaid insurance premiums on property located in Ohio—Sections 5325-1, 5328-1 and 5328-2, General Code.*

(Nos. 31037, 31038, 31079, 31080 and 31081—Decided August 4, 1948)

## Appeals from the Board of Tax Appeals

Five cases are here involved.

Each appellant is a foreign corporation which operates at least one manufacturing plant in the state of Ohio. Of

the five appeals two have been perfected by the National Distillers Products Corporation, a Virginia corporation, one by the Wheeling Steel Corporation, a Delaware corporation, and two by the United States Gypsum Company, an Illinois corporation.

In each case the Tax Commissioner of Ohio made an additional assessment of either intangible personal property tax or corporation franchise tax.

In each instance the order was appealed to the Board of Tax Appeals and was affirmed.

The cases are in this court for review on the contention of the appellant corporations that the decisions of the Board of Tax Appeals are unreasonable and unlawful.

### *Opinion Per Curiam*

*Mr. Isadore Topper*, for appellant National Distillers Products Corporation.

*Messrs. Dargusch, Caren, Greek & King*, for appellant Wheeling Steel Corporation.

*Messrs. Scott, MacLeish & Falk, Mr. Clarence D. Laylin, Mr. Charles M. Price, Mr. Clifford C. Pratt and Mr. Joseph A. Dubbs*, for appellant United States Gypsum Company.

*Mr. Hugh S. Jenkins*, attorney general, and *Mr. Daronne R. Tate* for appellee.

### BY THE COURT:

These cases were presented together for the reason that all five of them involve similar questions of situs under the provisions of Sections 5328-1 and 5328-2, General Code.

These and cognate provisions have been discussed and applied in many recent decisions by this court. *Aluminum Co. of America v. Evatt*, Tax Commr., 140 Ohio St., 385, 45 N.E. (2d) 118; *Proctor & Gamble Co. v. Evatt*, Tax Commr., 142 Ohio Stat. 369, 52 N.E. (2d) 517; *Ransom & Randolph Co. v. Evatt*, Tax Commr., 142 Ohio St. 398, 52 N.E. (2d), 738; *Haverfield Co. v. Evatt*, Tax Commr., 143 Ohio Stat. 58, 54 N.E. (2d) 149; *C. F. Kettering, Inc., v. Evatt*, Tax Commr., 144 Ohio St. 419, 59 N.E. (2d) 370; *National Cash Register Co. v. Evatt*, Tax Commr., 145 Ohio



St. 597, 62 N.E. (2d) 327; American Rolling Mill Co. v. Evatt, Tax Commr., 147 Ohio St. 207, 70 N.E. (2d) 631.

Section 5325-1, General Code, reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code, reads in part as follows:

"\* \* \* Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code \* \* \* shall be subject to taxation \* \* \*"

Section 5328-2, General Code, contains the following provisions:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

○ "In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in

such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state. \* \* \*

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a nonresident person such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The facts relating to two of the companies here involved are not in dispute and are supplied by stipulations. The two concerning the National Distillers Products Corporation are ten and nine pages respectively in length and need not be quoted in full for the purposes of this discussion. As above indicated, this company is a Virginia corporation. Its shareholders' meetings are held in that state. Its principal business office is located in the city of New York where the meetings of its directors are held and where all its business activities are controlled. All its accounts payable are paid from funds on deposit there. It has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton county, Ohio. It sells its products in every state where such products may be sold legally. Payroll checks for employees of these several plants and checks for federal excise taxes due from these plants are paid with funds on deposit in banks in those localities. The funds are obtained through checks drawn at the New York office on banks in that city. All accounts receivable are posted in the

books of the company in the New York office where the accounts are payable. All the receipts are deposited in New York banks. The accounts receivable, the allocation of which resulted in the additional assessments of intangible property tax and corporation franchise tax, arose from the sale of products manufactured by the company at its Carthage plant. The products were shipped from a stock of goods maintained by the company at that plant to points in Ohio and other states. All orders for the sale of these products were solicited by agents outside of Ohio. The orders were forwarded to New York and were subject to acceptance or rejection at the New York office. When orders were accepted, shipping instructions were forwarded to the Ohio plant from which the products were then shipped to the designated points in Ohio and elsewhere. The moneys received from the accounts receivable were used by the company in its business generally wherever needed. In filing its annual report and tax return the company allocated none of its accounts receivable to Ohio.

In its opinion the Board of Tax Appeals correctly summarized the matter as follows:

“The appellant, as a corporation organized and existing under the laws of the state of Virginia, is a legal resident of that state; and as to the appellant corporation the state of Ohio is ‘a state other than that in which the owner thereof resides’ and such other state within the provisions of Section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this board hereby finds—in the conduct of its business in the state of Ohio by the sale of its products from a stock of goods located in this state, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this state or elsewhere, such accounts receivable have a business and taxable situs in the state of Ohio, as found and determined by the Tax Commissioner.”



The company contends further that this interpretation of Section 5328-2, General Code, renders these provisions violative of the due-process and equal-protection clauses of the state and federal constitutions. However, this question was squarely and properly decided in the recent case of *Parke, Davis & Co. v. City of Atlanta*, 200 Ga. 296, 36 S.E. (2d) 773, 163 A.L.R. 976, in which the first and fourth paragraphs of the syllabus read as follows:

"1. Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the state, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the city of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by the nonresident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the city of Atlanta and the state of Georgia. \* \* \*

"4. Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment to the Constitution of the United States, or paragraphs 2 and 3 of Section 1 in Article I of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the state."

The facts concerning the Wheeling Steel Corporation are embodied likewise in a stipulation. As already stated, it is a Delaware corporation and maintains an office in that state. However, Wheeling, West Virginia, is the location of its

principal office and place of business where all meetings of the share holders, directors and executive committee are held. Its general books and accounting records are kept there. All credit is determined there; and the collections of notes and accounts receivable are made there. Four manufacturing plants are operated in West Virginia and four in Ohio. Sales offices are maintained in twelve states—one in Ohio. When notes and accounts receivable are paid, the avails thereof are applied indiscriminately to the general purposes of the company's business, whether in Ohio or elsewhere. Pay rolls are prepared and pay-roll checks are prepared, signed and distributed at each plant. Bank balances sufficient for this purpose are maintained in each such community.

In its opinion the Board of Tax Appeals said in part:

"It is clear that under this statute (Section 5328-1, General Code) intangibles owned by a nonresident cannot be taxed unless they are both used in business in this state and arise out of business transacted here. \* \* \*

"Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this state and elsewhere, they must be held to be used in business within the meaning of this statute (Section 5325-1, General Code). \* \* \*

"It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118; decided by this board on March 12, 1947. In that case approximately 90%

of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state and, consequently, are taxable here.

"No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this state. As to this, Section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The board finds that these prepaid items relate to property used in appellant's business in this state and, in view of the above statutory provisions, arose out of business transacted in this state and are, therefore, taxable."

The facts concerning the United States Gypsum Company are presented by a stipulation of facts and the testimony of two witnesses.

This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All pay-roll checks are prepared and signed there and are drawn on funds there and in Ohio.



Sales are managed and directed through divisional and district sales offices. Two district offices are located in Ohio. Orders taken by salesmen are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States, and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere.

In its opinion the Board of Tax Appeals reached the following conclusion:

"The evidence shows that certain manufacturing or processing of the raw products, which were kept on hand at its Ohio plants in sufficient quantities to fill any orders that may be received, was necessary to convert them into the completed products ordered. This process took anywhere from approximately four minutes to less than one hour. The board is of the opinion that it makes no difference whether the products were put into their completed form before or after the orders therefor were accepted and received. The evidence shows that the appellant did maintain in Ohio a stock of goods which was necessary to make the completed products sold by it. The same questions arose in the case of *National Distillers Products Corporation v. Glander*, No. 11118 decided by this board on March 12, 1947, and the case of *Wheeling Steel Corporation v. Glander*, No. 9681 decided by this board April 7, 1947. Reference is hereby made to the entries in those cases and also to the case of *National Distillers Products Corporation v. Glander*, No. 9095 with reference to a franchise tax assessment decided on March 12, 1947.

"For the foregoing reasons the board finds that the ac-

counts receivable in question resulted from sales of property from a stock of goods maintained in Ohio."

The company insists that there is a total lack of integration of the accounts receivable with that part of the company's total business which is conducted in Ohio. This court finds that it cannot agree with this contention. In this and the other cases the decisions of the Board of Tax Appeals must be affirmed.

*Decisions affirmed.*

Weygandt, C. J., Turner, Matthias, Hart, Zimmerman, Sohngen and Stewart, JJ., concur.

## APPENDIX B

### BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION OF OHIO

Apr. 7, 1947.

No. 9681

WHEELING STEEL CORPORATION, *Appellant*,

*v.*

C. EMORY GLANDER, Tax Commissioner of Ohio, *Appellee*

#### ENTRY

This cause came on for hearing upon an appeal from the final order of the tax commissioner denying an application for review and redetermination with respect to an assessment made by him against the appellant on its taxable credits consisting of notes or accounts receivable and prepaid items, which assessment amounted to \$6,280.35. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, the stipulation of facts and briefs of counsel.

From the stipulation of facts it appears that appellant is a Delaware corporation, in which state it maintained a statutory office. Its principal office and place of business

were located in Wheeling, West Virginia, where all the officers had their offices, where all meetings of shareholders, directors and the executive committee were held and where all dividends were declared. All of appellant's general books and accounting records were kept at the Wheeling office. All credit was granted and collections of accounts and notes receivable, etc. were made there. Appellant operated four manufacturing plants in West Virginia and four in Ohio. It maintained sales offices in twelve states, one of which offices was located in Cincinnati, Ohio.

The stipulation also contains the following:

"Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax listing day in 1942 resulted either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. \* \* \*

"All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. The sales offices had no powers or duties with respect to the creation, custody, collection or extinguishment of said notes.

"All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avails of said accounts receivable were under the control of the Treasurer of appellant and were applied in-



discriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of said accounts receivable were kept at the sales offices which had no powers or duties with respect to the collection thereof.

"All of said notes and accounts receivable arose in the ordinary course of appellant's business of making sales of its products.

"Payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants. Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose. All commercial and other accounts payable were paid by checks signed at and issued at the Wheeling office.

"All policies of insurance against loss or liability purchased by appellant were negotiated at the Wheeling office, where they were delivered, paid for and kept. Such policies were blanket policies covering properties and potential risks in West Virginia, Ohio and other states.

"All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942."

In its consolidated inter-county return appellant allocated all of its accounts receivable and prepaid items outside of Ohio. The tax commissioner, on the other hand, determined that certain of the credits owned by appellant and its subsidiaries had their situs in Ohio and that the amount thereof which was, therefore, taxable in this State was \$2,093,450, making an assessment thereon of \$6,280.35, which is the subject of this appeal. The amount of such credits was arrived at as follows:

"In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of \$5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and accounts receivable resulted from the sale of products shipped from appellant's Ohio manufacturing plants; that \$225,328 in prepaid insurance had arisen out of business transacted in

Ohio inasmuch as it represented prepaid premiums for insurance on appellant's Ohio manufacturing plants. The total of the credits so determined to have arisen out of business transacted by appellant in Ohio was \$5,475,853 and was 47.623% of all of appellant's and its subsidiaries' notes, accounts receivable and prepaid items which amounted to \$11,498,424 on tax-listing day in 1942. Appellee then computed said assessment by deducting \$7,102,540, the total of appellant's and its subsidiaries' accounts payable, from \$11,498,424, the total of the notes and accounts receivable and prepaid items, and assessing 47.623% of the remainder, to-wit, \$2,093,450, as credits taxable in Ohio."

One question presented is whether the tax commissioner erred in allocating to Ohio the accounts receivable which arose from sales of goods which were shipped from its plants in this State. In determining this question the Board is bound to follow the statutes applicable thereto, as construed by the Supreme Court. Section 5328-1, General Code, provides in part as follows:

"Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation;"

It is clear that under this statute intangibles owned by a nonresident cannot be taxed unless they are both used in business in this State and arise out of business transacted here. Section 5325-1, General Code, reads in part as follows:

"Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. *Ransom & Randolph Co. v. Evatt*, 142 O. S. 398, 27 O. O. 348, 37 O. L. A. 481, 10 O. Supp. 25, 52 N. E. (2d) 738; *Haverfield Company v. Evatt*, 143 O. S. 58, 28 O. O. 16, 54 N. E. (2d) 149.

We come now to section 5328-2, General Code, which provides, with reference to the situs of accounts receivable, as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state. \* \* \*"

Said section also provides that:

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances."

This reciprocal provision indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would



have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this Board has no right to declare a statute unconstitutional. *Hillsborough Township v. Cromwell*, 90 L. Ed. 298; *Schwartz v. Essex County Board of Taxation*, 129 N. J. L. 129, affirmed 130 N. J. L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court. In the case of *National Cash Register Company v. Evatt*, 145 O. S. 597, 31 O.O. 218, 42 O. L. A. 545, 15-O. Supp. 144, 62 N. E. (2d) 327, the Court held that accounts receivable of the company, a Maryland corporation, which arose from sales made outside of Ohio of goods filled by shipment from its manufacturing plant in Ohio, were taxable in this State. The Court said:

“We direct our attention first to the question whether the accounts receivable, arising from sales outside Ohio and filled from a stock of goods in Ohio, have an Ohio situs for purpose of taxation.”

In referring to section 5328-2, General Code, the Court said:

“Applying that section to the facts in the instant case, it means that accounts receivable, belonging to a Maryland corporation, when resulting from sales of property by an agent having an office in Ohio or *from a stock of goods maintained in Ohio*, shall be considered to arise out of business transacted in Ohio.”

It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that

none of its accounts receivable is taxable here. The Board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of National Distillers Products Corporation *v.* Glander, No. 11118, decided by this Board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the Board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

For the foregoing reasons the Board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this State and, consequently, are taxable here.

No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this State. As to this, section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The Board finds that these prepaid items relate to property used in appellant's business in this State and, in view of the above statutory provisions, arose out of business transacted in this State and are, therefore, taxable.

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the De-

partment of Taxation, this day taken with respect to the above matter.

(S.) EDWARD J. KIRWIN,  
*Secretary.*

## APPENDIX C

SUPREME COURT OF OHIO

No. 31079

WHEELING STEEL CORPORATION, Appellant,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO, Appellee

### Certificate

On motion of appellant, Wheeling Steel Corporation, the Court orders it to be certified and made a part of the record of the proceedings and of the judgment of affirmance in this cause that in its Notice of Appeal to this Court from the Board of Tax Appeals, appellant drew in question the validity of Sections 5328-1 and 5328-2 of the General Code of Ohio upon the ground that, as construed and applied by the Tax Commissioner and the Board of Tax Appeals of Ohio, said statutes are unconstitutional in this, that they burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and deprive appellant of its property without due process of law, and deny appellant equal protection of the laws of the state of Ohio, contrary to the Fourteenth Amendment to the Constitution of the United States; and that the question of the validity of said statutes, as specified in said notice of appeal, was urged upon the Court in the briefs and arguments of counsel for appellant; that a determination of the question was necessary to the decision of this case; and further, that upon consideration of the same, the Court was of the opinion, and so decided,



that said statutes are valid and are not repugnant to the Constitution of the United States.

Witness the Honorable the Supreme Court of Ohio this  
1 day of November, 1948.

SUPREME COURT OF OHIO,  
CARL V. WEYGANDT,  
*Chief Justice of the Supreme Court of Ohio.*

(9827)

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No. 447.

# Supreme Court of the United States

OCTOBER TERM, 1948

WHEELING STEEL CORPORATION,

*Appellant,*

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO,

*Appellee.*

## BRIEF FOR APPELLANT

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# Supreme Court of the United States

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No. 447.

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WHEELING STEEL CORPORATION,

*Appellant,*

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO,

*Appellee.*

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**BRIEF FOR APPELLANT**

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## OPINIONS BELOW

The opinion delivered by the Supreme Court of Ohio in this case (R. 16) is reported officially in Volume 150, Ohio State Reports, beginning at page 229 (Ohio Bar, August 9, 1948). The opinion of the Board of Tax Appeals of Ohio (R. 67) is reported unofficially in Volume 72, Northeastern Reporter, Second Series, beginning at page 592. The opinion of the Tax Commissioner of Ohio (R. 57) is not reported.



## STATEMENT OF JURISDICTION

This case was heard and decided by the Supreme Court of Ohio on an appeal from a final order of the Board of Tax Appeals of Ohio affirming assessment by the state Tax Commissioner<sup>1</sup> of an ad valorem tax in respect of certain promissory notes and accounts receivable belonging to appellant, Wheeling Steel Corporation, a Delaware corporation having its principal office and commercial domicile in West Virginia<sup>2</sup> and authorized to do business in Ohio. At every stage of the proceedings, before the Commissioner (R. 57), before the Board (R. 35) and before the Court (R. 15), appellant drew in question the validity of Sections 5328-1 and 5328-2<sup>3</sup> of the General Code of Ohio, which purport to authorize the assessment, on the ground that, as interpreted and applied, they are repugnant to the Constitution of the United States. Both the Commissioner (R. 58) and the Board (R. 71) refused to consider the question of the validity of the statutes, saying they were without authority to declare statutes unconstitutional; the Court decided in favor of their validity (R. 25). In its notice of appeal to the Supreme Court of Ohio (R. 8) the highest court of the state in which a decision could be had, appellant assigned as grounds for reversal of the decision of the Board of Tax Appeals that the statutes in question, as construed and applied by the Commissioner and the Board, burden and obstruct interstate commerce, deprive appellant of its property without due

1. C. Emory Glander, Tax Commissioner of Ohio, is the appellee and is referred to in this brief as the "Commissioner".

2. See *Wheeling Steel Corp. vs. Fox*, 298 U. S. 193.

3. The pertinent parts of these and other Ohio statutes mentioned in this brief appear in the appendix, beginning at page 30.

process of law and deny it the equal protection of the laws (R. 15). A determination of the constitutional questions thus raised by appellant was necessary to the decision of the case and the Ohio Supreme Court considered these questions and decided that the statutes are valid and are not repugnant to the Constitution of the United States (R. 25).

The judgment of that Court was entered on August 4, 1948 and became final on October 6, 1948 upon the overruling of an application for rehearing filed by appellant on August 17, 1948 (R. 7). An appeal to this Court was allowed by Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on November 1, 1948 (R. 3).

Jurisdiction of this Court is invoked under favor of Title 28, United States Code, Section 1257 (Pub. L. No. 773, 80th Cong., 2d Sess.).

## **STATEMENT OF THE CASE**

### **The Legal Issues**

The question is, may the state of Ohio collect from appellant, a foreign corporation authorized to do business within its borders, an ad valorem tax in respect of notes and accounts receivable (a) whose only link with Ohio is the fact that they can be traced back to sales of products delivered from appellant's manufacturing plants in Ohio, and (b) notwithstanding that

(1) the sales giving rise to the receivables resulted in the main<sup>4</sup> from purchase orders placed by customers at sales offices maintained by appellant in 12 states,<sup>5</sup>

4. Some purchase orders were sent directly by the purchasers to appellant's principal office in Wheeling, West Virginia.

5. Georgia, New York, Ohio, Michigan, Louisiana, Pennsylvania, California, Massachusetts, Illinois, Texas, Missouri, and Washington.

which were forwarded by mail from the originating sales offices to the principal office in Wheeling, West Virginia;

(2) the purchase orders in every instance were subject to acceptance and were in fact accepted at the principal office in Wheeling;

(3) the notes and other documents evidencing the receivables were at all times kept in Wheeling and were at all times under the control of appellant's treasurer in that city;

(4) the receivables in every instance were payable at Wheeling and were there paid;

(5) the proceeds of the receivables, when paid, were under the supervision and control of appellant's treasurer in Wheeling and were there drawn upon for the general purposes of the business;

(6) the identical receivables would not be taxable if appellant were an Ohio corporation, the Ohio Supreme Court having held that intangibles of the same sort arising, held and used in precisely the same manner are exempt if they belong to a domestic corporation,<sup>6</sup> taxable if they belong to a foreign corporation.

Appellant contends:

(1) that Ohio has no jurisdiction to tax these intangibles and that its attempt to do so contravenes the due process clause of the Fourteenth Amendment (see pp. 10-17 of this brief);

(2) that the attempted exaction is void under the Commerce Clause because it would subject appellant to a multiple property-tax burden since (a) the receivables are already subject to ad valorem taxation in both Delaware and West Virginia, appellant's legal and commercial domiciles respectively, and (b) if Ohio has authority

<sup>6</sup> Ransom & Randolph Co. vs. Evatt, 142 O. S. 398 (1944).



to tax, no reason appears why the state of origination of an order should not likewise have authority, thus increasing to four the number of states permitted to tax the proceeds of a single sale. That is, the state of origination of the order, the state of acceptance of the order, the state supplying the goods to fill the order and the state of incorporation (see pp. 17-20 of this brief);

(3) that the attempted exaction denies appellant the equal protection of the laws because it discriminates against appellant and in favor of similar local enterprises since the very same receivables arising, held and used in the very same fashion would be exempt from property taxation if they belonged to an Ohio corporation, and are singled out for assessment only because appellant is a foreign corporation (see pp. 20-27 of this brief).

### **The Agreed Facts**

There is no issue as to the facts of the case, all of which were stipulated by counsel for the parties. In essence they are that at the times mentioned in the stipulation, appellant was a Delaware corporation engaged in the business of manufacturing and selling steel and steel products. Its general offices were located in Wheeling, West Virginia where all of its officers had their offices, meetings of its board of directors were held and the records of its business were kept. Custody and control of its money, notes, securities and other valuable effects were exercised by the corporation's treasurer, whose office was in Wheeling, and all commercial and other accounts payable were paid by checks signed and issued

7. The full stipulation of facts appears in the Record beginning at page 60.

at the Wheeling office. Appellant had eight manufacturing plants situated in Wheeling, Benwood, Follansbee and Beech Bottom, West Virginia, and in Steubenville, Yorkville, Martins Ferry and Portsmouth, Ohio. Sales offices were maintained in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San Francisco, California; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, Missouri; Seattle, Washington; and New York City.

Orders for steel and steel products were solicited and received at the sales offices subject to acceptance or rejection at the Wheeling office and all orders received at the sales offices were forwarded to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only at the Wheeling office where all promissory notes and accounts receivable resulting from sales were payable and where the records of the accounts and the notes themselves were kept. All accounts were billed from the Wheeling office and the sales offices had no powers or duties with respect to their collection. Proceeds of all receivables, when and as paid, were in the custody of appellant's treasurer at Wheeling and were there applied to the general purposes of the business.

Appellant filed a personal property tax return (R. 37-57) for 1942 with the Department of Taxation of Ohio and listed in the return the machinery and equipment of its Ohio plants, its stocks of finished and semi-finished products, inventories of raw materials, supplies and other tangible personal property situated in Ohio on

January 1, 1942 (R. 52). The only intangible property shown in the return (R. 43) as having a situs in Ohio for purposes of taxation were certain deposits which were maintained in Ohio banks and which were used to meet the payrolls of the Ohio plants. All notes and accounts receivable were shown in the return (R. 43) as having a situs for taxation outside of Ohio.

Upon examination of appellant's records at the Wheeling office, the Commissioner ordered the assessment for taxation in Ohio of \$5,250,525 out of a total of approximately \$9,300,000 in notes and accounts receivable appearing on appellant's books on January 1, 1942 (R. 43) for the specific reason that they "resulted from the sale of products shipped from appellant's manufacturing plants in Ohio".

Some of the receivables so assessed for property taxation in Ohio resulted from sales of products out of inventory; the greater part, however, resulted from sales of products manufactured after receipt of specific orders for them. Some of the orders from which the receivables eventuated were sent directly by the customers to the Wheeling office and were there accepted, but most of the orders were received at the various sales offices and were forwarded to Wheeling for acceptance.

Property taxes on all of its receivables were paid by appellant to the state of West Virginia for the year 1942.

### **SPECIFICATION OF ERRORS**

Appellant intends to urge as grounds for reversal of the judgment of the Supreme Court of Ohio, all of the errors in the record, proceedings, decision and final judgment of the Supreme Court of Ohio specified in the Assignment of Errors filed with the Clerk of the Supreme



Court of the United States on November 2, 1948, to-wit (R. 2, 3):

"1. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with Article I, Section 8 of the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they subject to taxation in Ohio receipts from interstate activities carried on outside of Ohio, thus subjecting the property to the risk of a double tax burden to which intrastate commerce is not exposed and thereby burdening and obstructing interstate commerce.

"2. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they require the assessment of a property tax against intangible property which was not within the jurisdiction of the state of Ohio, thereby depriving appellant of its property without due process of law.

"3. The Court erred in holding and deciding that, as applied, Sections 5328-1 and 5328-2, General Code, are not in conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The Court should have held and decided that the statutes, as applied, are invalid in that they require the imposition of a property tax against the intangible property of appellant, a non-resident, but exempt identical property of a resident from taxation in Ohio, thereby denying appellant equal protection of the laws of Ohio."

### **SUMMARY OF ARGUMENT**

The state of Ohio lacks jurisdiction to impose a property tax upon notes and accounts receivable of a foreign corporation in the absence of evidence (lacking in this

case) that the receivables are an integral part of some local business and that, as a consequence, benefits or protection are conferred upon the receivables, or upon their owner with respect to them, for which the state is entitled to ask return.

*Wheeling Steel Corporation vs. Fox*, 298 U. S. 193;  
*First Bank Stock Corp. vs. Minnesota*, 301 U. S. 234;

*Newark Fire Insurance Co. vs. Board of Tax Appeals*, 307 U. S. 313;

*Beidler vs. South Carolina*, 282 U. S. 1;

*Curry vs. McCanless*, 307 U. S. 357;

*Tax Commission vs. Aldrich*, 316 U. S. 174;

*Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435.

A state property tax on the proceeds of sales in interstate commerce, such as the tax here involved, which can be duplicated by two other states and in substantial part a third time, and has already been laid by two states, unduly burdens interstate commerce.

*Western Live Stock vs. Bureau of Revenue*, 303 U. S. 250;

*J. D. Adams Mfg. Co. vs. Storen*, 304 U. S. 307;

*Gwin, White & Prince vs. Henneford*, 305 U. S. 434;

*Freeman vs. Hewit*, 329 U. S. 249;

*Memphis Natural Gas Co. vs. Stone*, 335 U. S. 80.

A state may not lay a property tax on intangible property of a foreign corporation authorized to do business within its borders and at the same time exempt identical property of competing domestic corporations doing business in exactly the same manner and the attempt of the state to do so constitutes a denial of the equal protection of its laws.

*Hanover Fire Ins. Co. vs. Harding*, 272 U. S. 494;

*Hillsborough Township vs. Cromwell*, 326 U. S. 620;

*Concordia Fire Ins. Co. vs. Illinois*, 292 U. S. 535;

*Southern Railway Co. vs. Greene*, 216 U. S. 400.

## ARGUMENT

All notes and accounts receivable resulting from sales of products produced at appellant's Ohio manufacturing plants were assessed for taxation in Ohio. The assessment was made under Sections 5328-1 and 5328-2<sup>9</sup>, and the tax was levied under Section 5638<sup>9</sup>.

(a) Sections 5328-1 and 5328-2, as construed and applied in this case<sup>10</sup> are invalid under the due process clause of the Fourteenth Amendment.

There is no question that the tax assessed against appellant's receivables is an ad valorem property tax (*Ben-*

8. All statutory references are to sections of the General Code of Ohio.

9. "Section 5638: Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to wit:

Investments, five per centum of income yield or of income as provided by Section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar, \* \* \*"

The word "credits", as used in the foregoing statute is defined in Section 5327 as follows:

"Section 5327: The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. \* \* \*"

10. See Note, "Taxability of Open Accounts—Situs and the Fourteenth Amendment," 17 U. of Cinti. L. Rev. 61 (Jan., 1948.).

See also address of Aubrey A. Wendt, Esq., Ass't Atty Gen. of Ohio, at National Tax Administrators Association Convention on the subject of "Tax Situs of Intangibles", reported in Prentice-Hall State and Local Tax Service (Ohio) par. 34,267.



*Wett vs. Evatt*, 145 O. S. 587) and that the assessment is predicated solely upon the fact that the receivables resulted from sales of products manufactured by appellant in its Ohio plants. The basis of the assessment was stipulated by counsel for the parties, (R. 62, 63) viz. ●

"10. In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of \$5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and accounts receivable resulted from the sales of products shipped from appellant's Ohio manufacturing plants; \* \* \*

There is likewise no question that the receivables were created and kept outside of Ohio, and that, when paid, their avails were applied outside of Ohio to the general purposes of appellant's business. In this regard it was stipulated (R. 63, 64) that:

"12. Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax-listing day in 1942 resulted either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. \* \* \*

13. All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution.

and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. The sales offices had no powers or duties with respect to the creation, custody, collection or extinguishment of said notes.

14. All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avails of said accounts receivable were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of said accounts receivable were kept at the sales offices which had no powers or duties with respect to the collection thereof."

Finally, there is no evidence in the record that appellant conducted a localized business in Ohio in which the receivables were integrated, or that any officer or agent of appellant in Ohio exercised the slightest degree of control over them, or that Ohio conferred any benefit or protection upon appellant with respect to them. In this regard it is stipulated only that four of appellant's eight manufacturing plants were situated at different places in Ohio and that one of its fourteen sales offices was located at still another place in the state (R. 62).

The question raised by the attempt to tax in these circumstances was answered by this Court in *Wheeling Steel Corp. vs. Fox*, 298 U. S., 193, a case involving the identical factual set-up. In that case Chief Justice Hughes, speaking for the Court said (p. 212):

"The question here is not of the taxation of the plants in other States. The real estate, equipment and all tangible property there located is taxable by

those States respectively. The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. Such a tax on net gains is distinct from an ad valorem property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced."

The facts in the *Fox Case* (298 U. S., at pp. 205-206) as to the management of appellant's business, the location of its factories and sales offices, and the manner of creation, custody and control of notes and accounts receivable resulting from sales of its products are essentially the same as the facts of the present case, and upon these facts this Court based its decision that the receivables were within the jurisdiction of the state of West Virginia for purposes of property taxation. This decision



does not, of course, foreclose the right of the state of Ohio or any other state to tax receivables belonging to appellant upon a proper showing of jurisdiction over them. No such showing was attempted here.

In the present case, the factual situation is the same as that in the *Fox Case* in every material respect. The facts showing the connection, or lack of connection, between the receivables here in question and the state of Ohio are the same as they were in the prior case. In this case, as in the *Fox Case*, appellant owned and operated factories in Ohio, the products of which were sold in West Virginia. One sales office was maintained in Ohio at which orders were taken and forwarded to West Virginia for acceptance or rejection. These are the only facts connecting the state of Ohio with the receivables which it seeks to tax as property situated within its borders, and the only reason advanced by the state for assessing them is that they arose from sales of goods manufactured in Ohio.

In short, the record shows that the notes and accounts here involved are no more localized in Ohio than were those in question in the *Fox Case* and that, as stated in that case (298 U. S. 193, 212):

“ \* \* \* the tax is a property tax on accounts receivables, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.”

Although this Court has recognized repeatedly that choses in action may acquire a situs for property taxation apart from the domicile of their owner if they become integral parts of some local business (*First Bank Stock Corp. vs. Minnesota*, 301 U. S. 234; *Wheeling Steel*

*Co. p. vs. Fox*; 298 U. S. 193), whether or not such integration exists is a matter of proof. Referring to the foregoing cases and to a number of earlier ones, it is said in the opinion announced by Mr. Justice Reed in the case of *Newark Fire Insurance Co. vs. Board of Tax Appeals*, 307 U. S. 313, 319-320 that:

"Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court."

To the same effect is the statement made in the opinion of the Court in the case of *Beidler vs. South Carolina*, 282 U. S. 1, 8 that:

"... a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

In the present case the requisite proof that appellant conducted a localized business in Ohio in which the receivables in question were integrated is completely lacking. Manufacturing operations were carried on in Ohio and sales offices were maintained in twelve states, including Ohio, but there is no evidence of local control of any part of the business, whether manufacturing or selling, in Ohio or in any of the states in which sales offices were maintained. The management of the busi-

ness was centralized in Wheeling and there the receivables in question were created and kept and their avails applied to the general purposes of the business.

The concept of a business situs of intangible property apart from the domicile of the owner is a means of affording a non-domiciliary state the opportunity to make an exaction for benefits or protection conferred upon the property or upon the owner with respect to his property (*Curry vs. McCaless*, 307 U. S. 367-368), but as pointed out by Mr. Justice Frankfurter in his concurring opinion in the case of *Tax Commissioner vs. Aldrich*, 316 U. S. 174, 183:

"When a State gives nothing in return for exacting a tax, it may be said that there is no 'jurisdiction to tax'."

In the opinion of the Court in the case of *Wisconsin vs. J. C. Penney Co.*, 311 U. S. 435, it is said (p. 444) that:

"Taxable event," "jurisdiction to tax," "business situs," "extraterritoriality," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

In the instant case, Ohio has conferred no benefits or protection upon appellant with respect to the receivables in question for which it is entitled to ask return. The



record shows that the receivables were created by action taken at appellant's principal office in Wheeling, West Virginia, where they were payable and where the records of the accounts and the notes themselves were kept until paid. There is no evidence that any officer or agent of appellant in Ohio had or exercised the slightest degree of control over them. For their protection, appellant paid property taxes on them to the state of West Virginia.

It is true, of course, that the receivables resulted from sales of goods manufactured in Ohio, but the factories in which they were made, and all the machinery and equipment of the factories, as well as raw materials, finished goods and other property (R. 43) were subject to Ohio's property tax laws.<sup>11</sup> In addition, appellant was subject to the Ohio franchise tax, which includes in its measure the value of all property owned, and business done in Ohio.<sup>12</sup>

Appellant contends, therefore, that Ohio gave nothing for which it is entitled to tax the receivables in question and that the attempt of the state to do so constitutes a denial of due process.

**(b) The statutes in question are also invalid under the Commerce Clause.**

In the concurring opinion of Mr. Justice Rutledge in *International Harvester Co. vs. Dept. of Treasury*, 322 U. S. 240, 353, it is pointed out that:

“ ‘Due process’ and ‘commerce clause’ conceptions are not always sharply separable in dealing with these problems. To some extent they overlap.

11. Section 5625-3, General Code.

12. Sections 5495, 5497, 5498, 5499, General Code.

If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes 'undue'. But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce."

In the present case the "due process objection" is this: the fact that factories are located in Ohio is not sufficient, of itself, to confer jurisdiction upon the state to lay a property tax against all receivables resulting from sales of goods made in those factories. But that is not the only objection. The attempted exaction also offends the Commerce Clause. It offends the Commerce Clause because it can be duplicated to the fullest extent by two states (Delaware and West Virginia) and in substantial part a third time.

That the sales giving rise to the receivables sought to be taxed were sales in interstate commerce is not questioned. The receivables which Ohio has assessed for taxation are the proceeds of contracts of sale entered into in West Virginia. Some of the receivables resulted from orders taken at the sales offices subject to acceptance at Wheeling and some from orders sent directly to Wheeling by the purchasers; but all of the orders were in fact accepted at appellant's principal office in Wheeling where they ripened into contracts of sale. Shipments of the goods sold were made from appellant's four factories in Ohio, where the greater part of the goods, in dollar value, had been manufactured after receipt of specific orders

for them and only the lesser parts had been manufactured and kept on hand to fill orders.

It is settled that all of appellant's receivables are subject to property taxation in Delaware, appellant's legal domicile (*Cream of Wheat Co. vs. Grand Forks*, 253 U. S. 325) and in West Virginia, its commercial domicile (*Wheeling Steel Corp. vs. Fox*, 298 U. S. 193), and it is stipulated (R. 65) that property taxes on all of them were paid to the state of West Virginia for the year 1942.

Thus, if Ohio is permitted to tax, appellant will be exposed to identical exactions from three directions simultaneously. And if Ohio has authority to tax, no reason appears why the states wherein orders originate should not have similar authority. Ohio's only factual connection with these receivables is that appellant has factories therein from which goods are delivered against sales made in West Virginia. But other states have similar minimal factual connections. Appellant has sales offices in eleven states other than Ohio, namely, Massachusetts, New York, Pennsylvania, Georgia, Illinois, Michigan, Louisiana, Missouri, Texas, California and Washington. Orders are taken in all of these states and sent for acceptance or rejection to West Virginia. Without these orders there would be no receivables to tax. In other words, the origination of orders, the acceptance of orders and the delivery of the products sold were all equally indispensable to the creation of the accounts receivable. Accordingly, if Ohio, from which orders were filled, may tax, so also, it seems plain, may Massachusetts, New York, Pennsylvania, Georgia, Illinois, Michigan, Louisiana, Missouri, Texas, California and Washington, from which orders were received.



This means that all of appellant's receivables resulting from sales of goods manufactured in Ohio, which on January 1, 1942 amounted to \$5,250,525 out of a total of \$9,311,500 (R. 43), could be taxed as property in Delaware, West Virginia and Ohio, and such of the same receivables as eventuated from orders received at a sales office located in a state other than Ohio or West Virginia could be taxed for a fourth time in that state. Thus the Ohio tax can be duplicated to the fullest extent by two states and in substantial part by a third. That this duplication is not a mere possibility is indicated by the fact that two states, Ohio and West Virginia, have already assessed the property for taxation.

The doctrine that a state may not impose cumulative burden on commerce (*Western Live Stock vs. Bureau of Revenue*, 303 U. S. 250; *J. D. Adams Mfg. Co. vs. Storen*, 304 U. S. 307; *Gwin, White & Prince vs. Henneford*, 305 U. S. 434) fully applies here. If the Ohio tax is lawful, four states may tax the proceeds of the same interstate transactions, two having already done so. As pointed out in the opinion of the Court announced by Mr. Justice Frankfurter in the case of *Freeman vs. Hewit*, 329 U. S. 249, 256:

"If another State has taxed the same transaction, the burdensome consequences to interstate trade are undeniable."

(c) **The statutes in question are invalid under the equal protection clause of the Fourteenth Amendment.**

The statutory provisions which, as construed and applied, lay the tax here complained of, while at the same time exemyting domestic corporations in precisely the

same circumstances, are printed below. The meaning and effect of these statutes were at issue in *Ransom & Randolph vs. Evatt*, 142 O. S. 398 (1944). The decision in that case, when taken in conjunction with the decision in this case, lays bare the discrimination against foreign corporations and in favor of their domestic competitors which deprives appellant of the equal protection of the laws.

Section 5328-1: \* \* \* Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, \* \* \* shall be subject to taxation; and all such property of persons residing in this state used in, and arising out of business transacted outside of this state by, for or on behalf of such persons \* \* \* shall not be subject to taxation \* \* \*.

Section 5328-2: Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state.

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state, shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property to a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. \* \* \*

Section 5325-1: \* \* \* Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied in the conduct of the business, whether in this state or elsewhere. \* \* \*

In the *Ransom & Randolph* case the court decided that Section 5328-2 fixes the tax situs of accounts receivable<sup>13</sup> and that the receivables of an Ohio resident are exempt from property taxes in Ohio when (a) arising out of business transacted in another state and (b) used in business, whether in the foreign state or elsewhere. In other words, a resident's receivables need not *be used in business* in a foreign state to qualify for tax exemption: all that is necessary is that the receivables arise out of business in the foreign state and be used in business anywhere. Specifically, the Court said in its opinion (p. 408) that:

"The only statutory conditions for out of state situs of accounts receivable are that they shall be used in business and shall result from sale of property sold by an agent having office in such other state or from a stock of goods maintained therein."

In the present case, the Board decided (R. 70, 71, 72) that the accounts receivable of a non-resident are taxable

13. The second paragraph of the syllabus in *Ransom & Randolph Co. vs. Evatt* reads as follows:

"2. Section 5328-2, General Code, fixes the business situs of accounts receivable. When such receivables are used in business and result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, such receivables shall be considered, for the purpose of taxation, to have arisen out of business transacted in a state other than that in which the owner thereof resides. The provisions of such section are to be reciprocally applied to the end that all accounts-receivable having a business situs in this state shall be taxed in Ohio and no such property belonging to a resident of this state and having a business situs outside of this state shall be taxed in Ohio."

(The syllabus of a decision of the Supreme Court of Ohio is prepared by the judge assigned to write the opinion, and receives the assent of a majority of the court. It is the rule, therefore, that the syllabus states the law with reference to the facts upon which it is predicated. *The Baltimore & Ohio Railway Company vs. Baillie, et al.*, 112 O. S. 567, 570.)



in Ohio when (a) arising out of business transacted in Ohio and (b) used in business anywhere, and the Court affirmed the Board's decision (R. 22).

Thus the "business situs" of accounts receivable is determined solely by the place where they "arise out of business" as defined by Section 5328-2 which, as construed and applied, means one thing in the case of a foreign corporation, another thing entirely in the case of a domestic corporation. Specifically, in the case of an Ohio resident *no significance is attached to what is done in Ohio*. The fact that a stock of goods is maintained in Ohio is immaterial if the goods are sold by an agent having an office in another state. Receivables resulting from the sales are exempt from taxation in Ohio because of what is done outside of the state and what is done in Ohio is disregarded. Likewise, it is immaterial that sales are made by an agent having an office in Ohio if the sales are made from a stock of goods outside of the state. The fact that the stock of goods, from which the sales are made, is outside of Ohio is controlling and receivables resulting from the sales are exempt from taxation in Ohio notwithstanding that the sales are made in the state. In the case of a non-resident, however, *only what is done in Ohio is material*. The fact that sales are made by an agent having an office in another state is of no significance if the sales are made from a stock of goods in Ohio. Receivables resulting from the sales are taxable in Ohio because the sales are made there and the fact that the stock of goods is located in another state is of no consequence. So also, where sales are made by an agent having an office in another state from a stock of goods maintained in Ohio, receivables resulting from the sales are taxable in Ohio because of the location of the stock.

of goods in the state. The fact that the sales are made outside of Ohio is immaterial.

In other words, Sections 5328-1 and 5328-2 require that accounts receivable of a resident, when and wherever used in business, be exempted from taxation in Ohio:

- (a) if resulting from the sale of property sold by an agent having an office in a state other than Ohio, or
  - (b) if resulting from the sale of property from a stock of goods maintained in a state other than Ohio;
- and (2) that accounts receivable of a non-resident, when and wherever used in business, be taxed in Ohio:
- (a) if resulting from the sale of property sold by an agent having an office in Ohio, or
  - (b) if resulting from the sale of property from a stock of goods maintained in Ohio.

So construed, a resident of Ohio may maintain a stock of goods in Ohio and sell them through an agent having an office in another state, or he may maintain the stock of goods in another state and sell them through an agent having an office in Ohio and in either case all receivables resulting from the sales are exempted from taxation in Ohio by Sections 5328-1 and 5328-2. On the other hand, if a non-resident does business in exactly the same manner as the resident, maintaining a stock of goods in Ohio and selling the goods through an agent having an office in another state, or maintaining the stock of goods in another state and selling them through an agent having an office in Ohio, then, in either case, all of the receivables resulting from the non-resident's sales are taxable in Ohio under Sections 5328-1 and 5328-2. These instances are not unique as it is ordinary practice for businesses to have a stock of goods in one state and to sell

them in another at a sales office maintained for that purpose. Thus, accounts receivable arising out of one business are taxed in Ohio because the owner is a non-resident, while receivables arising out of a competing business, conducted in exactly the same manner as the other, are exempted from taxation in Ohio because the owner is a resident of the state.

Pursuant to this construction of the statutes, all of appellant's receivables resulting from sales of steel and steel products manufactured in its Ohio plants were assessed for taxation in Ohio on the ground that they resulted from the sale of property from a stock of goods maintained in Ohio (R. 22, 58, 72). Appellant vigorously opposed this conclusion in view of the stipulation (R. 63) that:

"11. Products shipped from appellant's Ohio manufacturing plants to fill the orders from which resulted the greater part, in dollar value, of the notes and accounts receivable owned by appellant and its subsidiaries on tax-listing day in 1942 were manufactured at said plants after receipt of, and to fill specific orders therefor and had not been manufactured prior to the receipt of orders and kept on hand to fill orders. A smaller part, in dollar value, of said notes and accounts receivable resulted from sales of products which had been manufactured prior to the receipt of orders therefor and kept on hand at said plants to fill any orders therefor that appellant might receive."

Assuming, however, that appellant did maintain a stock of goods in Ohio, it nevertheless sold the goods by taking orders for them at sales offices in eleven states outside of Ohio subject to acceptance at its principal office in Wheeling, West Virginia where all of the sales were concluded. Therefore, had appellant been an Ohio corporation, all of the receivables in question would have



been exempted from taxation in Ohio by Section 5328-2 on the ground that they resulted from sales of property sold by an agent having an office in another state.

This is the discrimination of which appellant complains. Its receivables were assessed for taxation only because it is a foreign corporation. Receivables of competing domestic corporations doing business in exactly the same manner as appellant are not subject to taxation in Ohio. Thus appellant's receivables are subject to taxation in Ohio while identical property of local enterprises is exempt from taxation.

The tax imposed upon appellant's receivables was levied under Section 5638, of which the pertinent provisions are the following:

"Section 5638: Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to-wit:

\* \* \* moneys, credits and all other taxable intangibles so listed, three mills on the dollar, \* \* \*"

The word, "credits", as used in the foregoing statute is defined in Section 5327 as follows:

"Section 5327: The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. \* \* \*"

The tax imposed by Section 5638 is an ad valorem tax (*Bennett vs. Evatt*, 145 O. S. 587). It is not an exaction for the privilege of doing business in Ohio. Ohio

levies a franchise tax<sup>14</sup> for that privilege and appellant was subject to that tax. Similar property of competing domestic corporations is not otherwise taxed. Under the circumstances, appellant is entitled to equality of treatment with domestic corporations of its same class.

In the case of *Hanover Fire Insurance Co. vs. Harding*, 270 U. S. 494, it is said in the opinion of the Court (510) that:

"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn upon the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

To the same effect is the following language appearing in the opinion of the Court in the case of *Hillsborough Township vs. Cromwell*, 326 U. S., 620, at page 623:

"The equal protection clause of the 14th Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is to equal treatment."

14. Sections 5495, 5498, 5499, General Code. See Appendix.

It is respectfully submitted that Sections 5328-1 and 5328-2, as construed and applied in this case, select appellant for discriminatory treatment by subjecting its property to ad valorem taxation while exempting identical property of domestic corporations of the same class from taxation and that the statutes, therefore, deny appellant the equal protection of the laws of Ohio. *Concordia Fire Insurance Co. vs. Illinois*, 292 U. S. 535; *Southern Railway Co. vs. Greene*, 216 U. S. 400.

### CONCLUSION

The tax in issue has all of the vices of which the tax approved in *Memphis Natural Gas Co. vs. Stone*, 335 U. S. 80, was said to be free.

First: There is no factual connection between the state and the property sufficient to support the tax. The record is barren of evidence that the receivables were an integral part of a business localized in Ohio. The receivables are separate items of property and are not to be considered as parts of the factories where the goods sold were made or of the sales offices where purchase orders were taken. Benefits and protection conferred by the state in respect of the factories and other real and personal property situated in Ohio were paid for by property taxes and the opportunities and advantages afforded the business as a whole were paid for by the franchise tax. There is no evidence in the record of benefits or protection conferred by the state with respect to the receivables as such. Therefore the assessment of the tax constitutes a denial of due process.

Second: The receivables are the proceeds of transactions entered into beyond the borders of the state. They are taxable as property in Delaware, the legal dom-



icile of their owner, and in West Virginia, its commercial domicile. If the Ohio tax is lawful, the same tax can be levied against a substantial part of the property by a fourth state. The Ohio tax, therefore, imposes a cumulative burden on interstate commerce and is invalid under the Commerce Clause.

Third: The receivables are taxable in Ohio because they belong to a non-resident. If they belonged to a resident they would be exempt from taxation. The tax is a property tax and not a charge imposed upon foreign corporations for the privilege of doing business in Ohio, and similar property of residents is not otherwise taxed. The assessment, therefore, selects appellant for discriminatory treatment and denies it the equal protection of the laws.

Respectfully submitted,

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## APPENDIX

### Statutes

#### Situs of Receivables

Section 5328-1: \* \* \* Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, \* \* \* shall be subject to taxation; and all such property of persons residing in this state used in, and arising out of business transacted outside of this state by, for or on behalf of such persons \* \* \* shall not be subject to taxation \* \* \*

Section 5328-2: Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

\* \* \* \* \*

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property to a per-

son residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. \* \* \*

Section 5325-1: \* \* \* Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. \* \* \*

### **Tax on Receivables**

Section 5638<sup>15</sup>: Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to wit:

\* \* \*; moneys, credits and all other taxable intangibles so listed, three mills on the dollar, \* \* \*

Section 5327: The term "credits" as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of business, other than taxes and assessments. \* \* \*

### **Tax on Real and Tangible Personal Property<sup>16</sup>**

Section 5625-3: The taxing authority of each subdivision is hereby authorized to levy taxes annually, sub-

15. Taxes are levied on the same kinds and classes of intangible property on the classified tax list of the State Auditor by Section 5638-1, General Code.

16. Other levies are authorized by Sections 5625-6 et seq., General Code.



ject to the limitation and restrictions of this act [G. C. Sec. 5625-1 to 5625-39], on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. . . .

### **Franchise Tax**

Section 5495: The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.

Section 5498: After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued and outstanding shares of stock of any such corporation

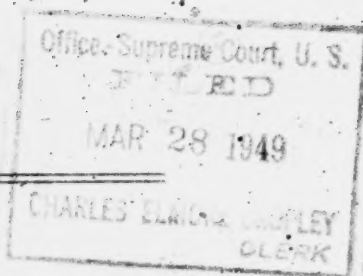
shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company, (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only) and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined by the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date

of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted. \* \* \*

Section 5499; On, or before June 15th the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one per cent. upon such value so certified and shall immediately certify the same to the treasurer of state, \* \* \*



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SUPREME COURT, U. S.



No. 447.

# Supreme Court of the United States

OCTOBER TERM, 1948

WHEELING STEEL CORPORATION,

*Appellant,*

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO,

*Appellee.*

## REPLY BRIEF FOR APPELLANT

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## REPLY BRIEF FOR APPELLANT

There are several statements and arguments made in the Brief of Appellee which tend to becloud the issues and require some clarification.

1. The Construction of Sections 5328-1 and 5328-2 by the Supreme Court of Ohio.

The discussion of the meaning of Sections 5328-1 and 5328-2 in the Brief of Appellee appears to be designed to create the impression that behind the decision of the Court in the instant case is a long record of consistent



administrative construction of the statutes and judicial approval thereof. That is not the case. The Court gave Sections 5328-1 and 5328-2 a new meaning in 1944 in two cases involving the receivables of residents (*Ransom & Randolph Co. v. Evatt*, 142 O. S. 398, and *Haverfield Co. v. Evatt*, 143 O. S. 58), and applied that meaning to receivables belonging to nonresidents for the first time in 1948 (*National Distillers Products Corp. v. Glander*, *Wheeling Steel Corp. v. Glander*, *United States Gypsum Co. v. Evatt*, 150 O. S. 229.).

Sections 5328-1 and 5328-2, General Code, became effective in 1932 and until construed by the Ohio Supreme Court, for the first time, in *Ransom & Randolph Co. v. Evatt* (1944), 142 O. S. 398, were interpreted and administered by the Tax Commissioner and his predecessor, the Tax Commission of Ohio, in conformity with the generally accepted principles of the concept of *business situs*.<sup>1</sup> This administrative construction was formalized on July 25, 1939, as required by a newly enacted statute,<sup>2</sup> by the filing in the office of the Secretary of State of Ohio of the Tax Commissioner's Rule No. 204.<sup>3</sup>

1. See *Tax Commission v. Kelley-Springfield Tire Co.*, 38 O. App. 109 (cert. den. 3-25-31).

2. Section 1464-4.

3. "Accounts receivable acquire a situs for taxation in a state other than that of the residence of the owner when such accounts receivable (a) 'arise out of business' in a state other than that in which the owner thereof resides and (b) are 'used in business' in a state other than that in which the owner thereof resides."

Accounts receivable shall be deemed to 'arise out of business' in a state other than that in which the owner thereof resides, in any one of the following classes of cases:

(a) When resulting from the sale of property sold by an agent having an established office in a state other than the residence of the owner.

A sale may be considered to be made 'by an agent', only if and when the agent has authority to bind his principal by entering into a contract of sale binding such principal; that is, if the agent's duty

In the *Ransom & Randolph* case, the Court invalidated the Tax Commissioner's rule and decided that the statutes in question mean that the receivables of a resident are exempt from taxation in Ohio (1) if used in business anywhere, and (2) if resulting (a) from the sale of property sold by an agent having an office in another state, or (b) from the sale of property from a stock of goods maintained in another state. Thus the Ohio Court dispensed with common law *business situs*.

is merely to solicit and receive orders of the particularly designated character in question, such orders being accepted by his principal at an office in a state other than that in which the order is taken, the transaction is not a 'sale by an agent.'

(b) When resulting from the sale of property from a stock of goods maintained in a state other than the residence of the owner.

(c) When resulting from services performed by the owner's agent or employee connected with, sent from or reporting to the owner's office located in a state other than that in which the owner resides.

Accounts receivable shall be deemed to be 'used in business' in a state other than the residence of the owner thereof when such accounts are subject to the control and management of an officer or agent of the owner at an office in a state other than that in which the owner thereof resides.

The foregoing rule applies reciprocally—that is whether Ohio is the residence or domicile of the owner or whether the owner resides or is domiciled in a foreign state."

(This rule is substantially the same as Amended Regulation No. 6, adopted February 20, 1934 by the Tax Commission of Ohio.)

4. "By the foregoing rule (Rule No. 204) the Tax Commissioner has attempted to add to the statutory requisite for out-of-state situs of accounts receivable, a condition similar to that contained in Section 5328-2, General Code, respecting deposits. The only statutory conditions for out-of-state situs of accounts receivable are that they shall be used in business and shall result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein (Section 5328-2, General Code). Nowhere in the statutes can be found the provision that such accounts receivable are to be 'subject to the control and management of an officer or agent of the owner at an office in a state other than that in which the owner thereof resides.' However we think that the accounts receivable in this case meet this test.

The decision below went further than the commissioner's rule or the statutes in holding in effect that the accounts receivable or the

The Court affirmed its position in this regard in *Haverfield Co. v. Evatt* (1944), 143 O. S. 58.

Within the year (1944), the Tax Commissioner instituted the present proceedings against appellant (R. 37) in order to test the validity of Sections 5328-1 and 5328-2, as interpreted by the Court in the *Ransom & Randolph* and *Haverfield* cases, when applied to the receivables of a nonresident. Similar proceedings were begun at about the same time against National Distillers Products Corporation and United States Gypsum Company. These are the only cases involving the situs for property taxation of receivables belonging to non-residents decided by the Ohio Supreme Court since 1932.

These cases were not decided by the Board of Tax Appeals until 1947 and on August 4, 1948 the Ohio Supreme Court affirmed the decision of the Board in this case that appellant's receivables are taxable in Ohio because (a) they were used in business generally, and (b) resulted from the sale of property from a stock of goods maintained in Ohio within the meaning of Section

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avails thereof must be used principally if not exclusively in the state of origin.

Such rule also exceeds the terms of Section 5325-1; General Code, which clearly states that where 'avails' of intangibles are applied or are intended to be applied in the conduct of the business, *whether in this state or elsewhere*, the intangibles shall be considered to be 'used.'

There is no justification for limiting the word 'business' to that part of the business done in states other than Ohio. (Section 5325-1, General Code.)

In addition to the statutes and rule of the Tax Commissioner the Board of Tax Appeals relied upon 'the general rule otherwise applicable in cases of this kind.'

When an unambiguous statute changes the common law on any subject, such statute is to be followed to the exclusion of any general rule otherwise applicable to cases coming within the purview of the statute." (*Ransom & Randolph v. Evatt*, 142 O. S. 408, 409.)



5328-2. The Board's decision in this regard reads (R. 70, 71) as follows:

"Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. *Ransom & Randolph Co. v. Evatt*, 142 O. S. 398, 27 O. O. 348, 37 O. L. A. 481, 10 O. Supp. 25, 52 N. E. (2d) 738; *Haverfield Company v. Evatt*, 143 O. S. 58, 28 O. O. 16, 54 N. E. (2d) 149.

This 'reciprocal provision' indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. *Hillsborough Township v. Cromwell*, 90 L. Ed. 298; *Schwartz v. County Board of Taxation*, 129 N. J. L. 129 affirmed 130 N. J. L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court."

° As a result of the Court's decisions in the *Ransom & Randolph* and *Haverfield* cases and in the instant case,

5. "Section 5328-2. \* \* \*

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances."

under Ohio law the taxability of receivables is a matter of legislative fiat and not of common law *business situs*, as counsel for the Tax Commissioner contend that it is. That it was the intent of the Ohio General Assembly that all intangible property having a *business situs* in Ohio should be taxed in Ohio and that no intangible property having a *business situs* outside of Ohio should be taxed in Ohio is undoubtedly true, as counsel for the Tax Commissioner contend; but that is not what the statutes in question mean according to the decisions of the Ohio Supreme Court. As stated in the opening brief for appellant, the decisions in the *Ransom & Randolph* case, and in this case, read in conjunction, make it crystal clear that the Ohio Supreme Court has decided that Sections 5328-1 and 5328-2 require that accounts receivable of a resident, when and wherever used in business, be exempted from taxation in Ohio:

(a) if resulting from the sale of property sold by an agent having an office in a state other than Ohio,  
or

(b) if resulting from the sale of property from a stock of goods maintained in a state other than Ohio:

and (2) that accounts receivable of a non-resident, when and wherever used in business, be taxed in Ohio:

(a) if resulting from the sale of property sold by an agent having an office in Ohio, or

(b) if resulting from the sale of property from a stock of goods maintained in Ohio.

This Court has repeatedly said that it is bound by the construction placed upon a state taxing statute by the highest court of the state. *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 93.

None of the decisions of the Ohio Supreme Court cited in the Brief of Appellee are inconsistent with the *Ran-*

som & Randolph decision and for the most part are not even pertinent. *National Cash Register v. Evatt*, 145 O. S. 597, and *Kettering, Inc. v. Evatt*, 144 O. S. 419 are franchise tax cases. *American Rolling Mill Co. v. Evatt*, 147 O. S. 207, involves the situs of bank deposits of a domestic corporation and a different test is applied to determine the taxability of deposits than in the case of receivables. *Procter & Gamble v. Evatt*, 142 O. S. 369, was decided before the *Ransom & Randolph* case and the decision is not in point.

## **2. The Decision of the Supreme Court of the United States in *Wheeling Steel Corporation v. Fox*.**

It is said in the Brief of Appellee (p. 26), with reference to the decision of this Court in *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, that: "The decision of this court in *Wheeling Steel Corp. v. Fox*, supra, is entirely favorable to the commissioner. It holds (1) that appellant's receivables and intangibles are subject to taxation in Delaware, even though there is in neither case any evidence that Delaware exercised its taxing power, and (2) that its receivables arising from its sales and shipments from its Ohio plants were subject to the Ohio tax and its receivables were subject to tax and were taxed in West Virginia after giving credit for Ohio taxes paid on intangibles." This statement is a little wide of the mark.

All of appellant's intangibles were assessed for taxation in West Virginia on January 1, 1931 under a statute requiring the assessment of intangible property of a foreign corporation having its principal place of business in the state, unless the property was shown to be

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6. Code 1931, 11-3-12, as amended by the legislature, Acts First Extraordinary Session 1933, Chapter 38, and Code 1931, 11-3-13.



primarily liable for taxation in some other jurisdiction. The Supreme Court of Appeals affirmed the assessment (*In Re Wheeling Steel Corporation Assessment*, 115 W. Va. 553) except as to receivables which had been returned for taxation in Ohio; and which the Court said it would assume for the purposes of the opinion were properly taxable in Ohio.

This Court affirmed the West Virginia Court (*Wheeling Steel Corp. v. Fox*, supra), holding that the state statutes, as construed and applied, did not deprive appellant of due process of law nor of the equal protection of the laws of the state.

In the argument of the case, counsel for Wheeling pointed to the extent of the company's manufacturing properties and operations in Ohio and argued that if the company's receivables were subject to taxation in any state other than Delaware, they were taxable in Ohio. It was in response to this argument that this Court said (298 U. S. 212, 213):

"The Corporation has manufacturing plants and sales offices in other States. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government:

"The question here is not of the taxation of the plants in other States. The real estate, equipment and all tangible property there located is taxable by those States respectively. The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are

kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. Such a tax on net gains is distinct from an ad valorem property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of ad valorem property taxation, the accounts receivable which arise from sales, and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale."

However, this Court pointed out that the Tax Commissioner of West Virginia had not appealed from the decision of the state court allowing the deduction from the assessment of the accounts taxed in Ohio and refused to disturb the decision of the West Virginia Court in this regard. In that connection this Court said (298 U. S. 215):

"Upon this record the question before us is with regard to the constitutional validity of the tax as

assessed in West Virginia and not as to the amount or validity of any tax assessed elsewhere."

It is apparent that, contrary to the statement in the Brief of Appellee, the Court did not decide in the *Fox* case that receivables arising from appellant's sales and shipments from its Ohio plants were subject to taxation in Ohio.

In concluding the opinion in the *Fox* case, the Court said (298 U. S. 216) that:

"The decision in the instant case, as we have seen, is not that the statutes require taxation in West Virginia of all of the intangibles of appellant, without due regard to the place where they may properly be deemed to be localized, but only of such intangibles as upon the facts and the law, according to the course of business, may be deemed to be within the jurisdiction of the State."

As stated in appellant's opening brief, it is not appellant's claim that the *Fox* case bars Ohio or any other state from taxing appellant's receivables upon a proper showing of jurisdiction over them. What appellant does claim is that Ohio has made no such showing in the present case. The evidence in this case is not sufficient to establish the localization of the receivables in question in Ohio.

### **3. Benefits and Protection conferred by Ohio upon Appellant's Property.**

Though they assert in general terms that Ohio conferred numerous benefits and protections upon appellant, opposing counsel neglect to specify what benefits and what protections appellant received from Ohio *in respect of the intangibles in issue in this case*. To be sure, ap-



pellant owned substantial property in Ohio,<sup>7</sup> as is set out in the stipulation. It owned both real and personal property, and paid taxes thereon. Furthermore, it was admitted to do business and did business in Ohio. For that privilege appellant paid the franchise tax imposed by Section 5495, of which the Ohio Supreme Court said in *Aluminum Co. v. Evatt*, 140 O. S. 385, 392:

"Under Section 5495, General Code, the franchise or excise tax authorized by Section 5499, General Code, and determined according to Section 5498, General Code, is levied upon foreign corporations 'for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.'"

In short appellant paid the stipulated price for the privilege of owning property and doing business in Ohio.

Appellee has not specified and appellant has been unable to discover any benefits accorded it by Ohio in respect of the intangibles in question which were not freely available to every other non-resident of every one of the other 47 states. Appellant could have had recourse to the courts of Ohio to enforce one or more of these receivables. But in that regard it was in no better position than all other non-residents who equally could have had recourse to the courts of Ohio, and without liability for property taxes in respect of their intangibles. So, too, appellant could have resorted to the courts of all the other states but assuredly that fact did not invest them

7. Appellant's subsidiaries, Wheeling Corrugated Company and Consolidated Expanded Metal Companies had warehouses in Columbus and Cleveland, respectively, not sales offices as claimed in the Brief for Appellee (p.8).

with jurisdiction over it. If it did, appellant and every other taxpayer is subject to the simultaneous exactions of 48 states.

In sum, appellant paid for what it got and objects to paying for unspecified additional benefits which in fact Ohio was in no position to deliver.

### CONCLUSION

It is the purpose of this Reply Brief to bring into focus the real question in this case, which is: May the state of Ohio collect from appellant, a foreign corporation authorized to do business within its borders, an ad valorem tax in respect of notes and accounts receivable (a) whose only link with Ohio is the fact that they can be traced back to sales of products delivered from appellant's manufacturing plants in Ohio, and (b) notwithstanding that

(1) the sales giving rise to the receivables resulted in the main from purchase orders placed by customers at sales offices maintained by appellant in 12 states, which were forwarded by mail from the originating sales offices to the principal office in Wheeling, West Virginia;

(2) the purchase orders in every instance were subject to acceptance and were in fact accepted at the principal office in Wheeling;

(3) the notes and other documents evidencing the receivables were at all times kept in Wheeling and were at all times under the control of appellant's treasurer in that city;

(4) the receivables in every instance were payable at Wheeling and were there paid;

(5) the proceeds of the receivables, when paid, were under the supervision and control of appellant's treas-

urer in Wheeling and were there drawn upon for the general purposes of the business;

(6) the identical receivables would not be taxable if appellant were an Ohio corporation, the Ohio Supreme Court having held that intangibles of the same sort arising, held and used in precisely the same manner are exempt if they belong to a domestic corporation, taxable if they belong to a foreign corporation.

Respectfully submitted,

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No. 447.

**Supreme Court of the United States**

OCTOBER TERM, 1948

WHEELING STEEL CORPORATION,

*Appellant,*

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO,

*Appellee.*

**BRIEF OF APPELLEE**

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## BRIEF OF APPELLEE

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### OPINIONS BELOW

The opinion delivered by the Supreme Court of Ohio in this case (R. 16) is reported officially in Volume 150, Ohio State Reports, beginning at page 229 (Ohio Bar, August 9, 1948). The opinion of the Board of Tax Appeals of Ohio (R. 67) is reported unofficially in Volume 72, Northeastern Reporter, Second Series, beginning at page 592. The opinion of the Tax Commissioner of Ohio (R. 57) is not reported.



## STATEMENT OF JURISDICTION

This case was heard and decided by the Supreme Court of Ohio on an appeal from a final order of the Board of Tax Appeals of Ohio affirming assessment by the Tax Commissioner of Ohio of an ad valorem tax in respect to certain credits consisting of certain notes and accounts receivable and prepaid insurance premiums (less certain notes and accounts payable) belonging to appellant, Wheeling Steel Corporation, a Delaware corporation having its principal office and its general business offices in West Virginia and authorized to do business in Ohio, under the pertinent and applicable Ohio statutes as interpreted and applied by and under a long line of decisions of the Supreme Court of Ohio and under which such credits had a tax situs in Ohio as they were used in business and arose out of business in Ohio and were taxable in Ohio. At every stage of the proceedings, before the commissioner (R. 57), before the board (R. 35), and before the court (R. 15), appellant drew in question the validity of Sections 5328-1 and 5328-2<sup>3</sup> of the General Code of Ohio, which authorize the assessment, claiming that they, as interpreted and applied, are repugnant to the Constitution of the United States. The commissioner, after considering the question of the validity of the statutes, ruled that he was without authority to declare a statute unconstitutional and that the assessment was in every respect proper (R. 35, 58), and the board, after consideration, ruled that

1. C. Emory Glander, Tax Commissioner of Ohio, is the appellee and is referred to in this brief as the "Commissioner."

2. See *Wheeling Steel Corp. vs. Fox*, 298 U.S. 193.

3. These and other Ohio statutes mentioned in this brief appear in the appendix, beginning at page 47.

it had no right to declare a statute unconstitutional (R. 71); the Supreme Court of Ohio expressly decided in favor of their validity (R. 25). In its notice of appeal to the Supreme Court of Ohio (R. 8), the highest court of the state in which a decision could be had, appellant assigned as grounds for reversal of the decision of the Board of Tax Appeals that the statutes in question, as construed and applied by the commissioner and the board, burden and obstruct interstate commerce, deprive appellant of its property without due process of law and deny it the equal protection of the laws (R. 15). A determination of the constitutional questions thus raised by appellant was necessary to the decision of the case and the Ohio Supreme Court considered these questions and decided that the statutes are valid and are not repugnant to the Constitution of the United States (R. 25).

The judgment of that court was entered on August 4, 1948, and became final on October 6, 1948, upon the overruling of an application for rehearing filed by appellant on August 17, 1948 (R. 7). An appeal to this court was allowed by Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on November 1, 1948 (R. 3).

Jurisdiction of this court was invoked by appellant under favor of Title 28, United States Code, Section 1257 (Pub. L. No. 773, 80th Cong., 2d Sess.).

## STATEMENT OF THE CASE

### The Legal Issues

The question is, may the state of Ohio impose against appellant, a Delaware corporation, authorized to do business within its borders, an ad valorem tax of three mills on the dollar in respect of the value of credits consisting of the sum of notes and accounts receivable due on demand or within one year from the date of inception and prepaid insurance premiums less the sum of notes and accounts payable, due on demand or within one year of the date of inception, all pertaining to appellant's business in Ohio,

(a) when said notes and accounts receivable arose from the acceptance at its general business offices in Wheeling, West Virginia, of orders for the sale of steel and steel products taken or received by and at appellant's various sales offices in Ohio and elsewhere and such orders were sent to appellant's manufacturing plants in Ohio where they were filled, some from a stock of goods manufactured at appellant's plants in Ohio and on hand in its said plants in Ohio and the rest from goods after they were manufactured at appellant's plants in Ohio, and

(b) when such notes and accounts receivable were payable and paid at appellant's general business offices in Wheeling, West Virginia, and

(c) when so paid the avails thereof were used for the general purposes of appellant's business, including payment of the expenditures and expenses of appellant's said Ohio plants, and

(d) when the general books and accounting records and the notes and other documents evidencing said notes



and accounts receivable were at all times kept in Wheeling, West Virginia, and were under the control of appellant's treasurer in that city, and

(e) when the only part of the proceeds of the collection of said notes and accounts receivable transferred to various bank accounts of appellant in Ohio was or were sums sufficient to make deposits to meet the payrolls of appellant's Ohio plants upon which Ohio bank accounts were drawn and issued by and at such Ohio plants checks to meet the payrolls of such plants, and

(f) when appellant had the greater part of its plants and equipment in Ohio and inventories and most of its tangible personal property in Ohio, and

(g) when the Ohio Supreme Court has held that these intangibles have a taxable situs in Ohio under Ohio statutes and under a line of decisions, of a number of years' standing, interpreting and applying such Ohio statutes.

**Appellee contends**

(1) that Ohio has jurisdiction to tax these intangibles as they were used in business and arose out of business in Ohio and, having such situs in Ohio, the imposition of the ad valorem tax at the rate of three mills on the dollar of value on such intangibles does not contravene the due process of the law clause of the Fourteenth Amendment,

(2) that the imposition and levy of the said ad valorem tax by Ohio on said intangibles, including receivables, is not void under the commerce clause as the intangibles have a business situs in Ohio and there is no evidence in the record as to what part, if any, thereof arose from the shipment of goods from Ohio to points outside of Ohio, and

(3) that the tax was imposed and assessed against appellant by the commissioner under Ohio statutes and, upon application and review, after hearing, the commissioner found such assessment valid and it was likewise so held by the Board of Tax Appeals of Ohio, and by the Supreme Court of Ohio, and the Ohio statutes under which such levy and assessment were made have been interpreted in a number of decisions by the Supreme Court of Ohio over a period of years and the Supreme Court of Ohio in such decisions has been consistent and uniform in its interpretation of such statutes, and the application thereof as against appellant has not been capricious or arbitrary and appellant has not been singled out for assessment because it is a foreign corporation and the Ohio statutes have been applied uniformly to business ventures whether incorporated under the laws of the state of Ohio or elsewhere, and further that the intangibles had a business situs and a tax situs in Ohio, and such Ohio statutes as interpreted and applied do not violate the equal protection clause of the Fourteenth Amendment.

## THE FACTS.

The facts were stipulated by counsel for the parties and the stipulation of facts is printed in the record at pages 60 to 65, both inclusive. The last paragraph thereof on page 65 reads as follows:

"19. The transcript of the proceedings heretofore had before the Tax Commissioner of Ohio in this matter prior to the taking of the within appeal is incorporated herein by reference and made a part hereof."

In essence, the facts are that at the times mentioned in the stipulation, appellant was a Delaware corporation engaged in the business of manufacturing and selling steel and steel products (R. 60, 61). Its general offices were located in Wheeling, West Virginia, where all of its officers had their offices, meetings of its board of directors were held, and its general books and its general accounting records were kept (R. 61). Custody and control of its money, notes, securities and other valuable effects were exercised by the corporation's treasurer, whose office was in Wheeling, and all commercial and other accounts payable were paid by checks signed and issued at the Wheeling office (R. 61, 62); however, appellant's payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants (R. 64). Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose (R. 64). Appellant had eight manufacturing plants situated in Wheeling, Benwood, Follansbee and Beech Bottom, West Virginia, and in Steubenville, Yorkville, Martins Ferry and Portsmouth, Ohio (R. 62). Sales offices



were maintained by appellant in Atlanta, Georgia; Buffalo, New York; Cincinnati, Ohio; Detroit, Michigan; New Orleans, Louisiana; Philadelphia, Pennsylvania; San Francisco, California; Boston, Massachusetts; Chicago, Illinois; Dallas, Texas; Los Angeles, California; St. Louis, Missouri; Seattle, Washington; and New York City (R. 62). Appellant's subsidiary, Wheeling Corrugating Company, a West Virginia corporation, had a sales office at Columbus, Ohio, and its subsidiary, Consolidated Expanded Metal Companies, had a sales office in Cleveland, Ohio (R. 39, 40).

Orders for steel and steel products were solicited and received at the sales offices subject to acceptance or rejection at the Wheeling office and all orders received at the sales offices were forwarded to the Wheeling office for that purpose (R. 62, 63). Credit was extended to purchasers and the terms thereof fixed only at the Wheeling office where all promissory notes and accounts receivable resulting from sales were payable and where the records of the accounts and the notes themselves were kept (R. 64, 62). All accounts were billed from the Wheeling office and the sales offices had no powers or duties with respect to their collection. Proceeds of all receivables, when and as paid, were in the custody of appellant's treasurer at Wheeling and were there applied to the general purposes of the business (R. 64).

Appellant filed an inter-county consolidated personal property tax return (R. 37-56) for 1942 with the Department of Taxation of Ohio and listed in the return the machinery and equipment of its Ohio plants, its stocks of finished and semi-finished products, inventories of raw materials, supplies and other tangible personal property situated in Ohio on January 1, 1942 (R. 52). The only intangible property shown in the return (R. 43) as hav-

ing a situs in Ohio for purposes of taxation was certain deposits which were maintained in Ohio banks and which were used to meet the payrolls of the Ohio plants. All notes and accounts receivable were shown in the return (R. 43) as having a situs for taxation outside of Ohio. The return showed total book value of \$68,968,402.33 for assets in Ohio and of \$69,395,495.90 for assets outside of Ohio (R. 43). The return showed total book value of approximately \$20,281,198.30 for items set forth under inventories in Ohio and of approximately \$12,897,251.78 for items set forth under inventories outside of Ohio (R. 43). The return showed total book value of plants and equipment of approximately \$48,373,427.63 in Ohio and of approximately \$19,392,955.86 outside of Ohio (R. 43, 65). The return showed finished goods in the county or counties of manufacture in Ohio of \$4,701,827.90 and stored in other counties in Ohio of \$64,806.36 (R. 43, 65). The return showed that appellant and its subsidiaries had tangible personal property in thirteen counties in Ohio (R. 52).

Upon examination of appellant's records at the Wheeling office, the commissioner ordered the assessment for taxation in Ohio for the year 1942 of \$2,093,452 out of a total of credits or net credits of \$4,395,884 appearing on appellant's books on January 1, 1942, (R. 66, 63). The applicable tax rate was three mills on each dollar of value and the tax was \$6,280.35 (R. 62, 63, 66). Included in said sum of \$2,093,452 so taxed were notes and accounts receivable of \$5,250,525 in Ohio out of a total of notes and accounts receivable of \$10,817,361 and prepaid insurance of \$225,328 in Ohio out of a total of prepaid insurance of \$449,717 making a total of credits in Ohio of \$5,475,853 from which were deducted \$3,382,401 for payable and accrued items in Ohio (R. 62, 63, 66). The

notes and accounts receivable of \$5,250,525 were so included for the specific reason that they "did result from the sale of property from a stock of goods maintained within this state" (Ohio) (R. 58), and the prepaid insurance of the value of \$225,328 was so included for the reason that it represented prepaid premiums on insurance policies covering appellant's Ohio manufacturing plants (R. 62, 63).

Some of the receivables so assessed for property taxation in Ohio resulted from sales of products out of inventory in Ohio and delivered from Ohio; the greater part, however, resulted from sales of products manufactured in Ohio and delivered from Ohio after receipt of specific orders for them (R. 63). Some of the orders from which all of the receivables appellant eventuated were sent directly by the customers to the Wheeling office and were there accepted, but most of the orders were received at the various sales offices outside of West Virginia and were forwarded to Wheeling for acceptance (R. 63). After acceptance, the orders were then filled by the various plants of appellant in Ohio and elsewhere (R. 63), but the receivables arising or resulting from the orders so filled from merchandise at or manufactured at appellant's plants in Ohio and shipped to customers from said Ohio plants were the only receivables taxed in Ohio (R. 63).

All of said notes and accounts receivable so taxed in Ohio arose in the ordinary course of appellant's business of making sales of its products manufactured and on hand in Ohio or manufactured in Ohio (R. 63, 64) and all were due within one year (R. 64).

Property taxes on all of its receivables were paid by appellant to the state of West Virginia for the year 1942 (R. 64, 65).



## THE OHIO STATUTES FOR THE TAXATION OF CREDITS AND ACCOUNTS RECEIVABLE

These statutes are printed in full in the appendix hereto. (pp. 47-53), post). The relevant portions are as follows:

Section 5325-1, General Code of Ohio, is entitled: "Application of term 'used in business'; definition of word 'business'." The entire section reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code of Ohio, is entitled: "Property to be entered on classification tax list and duplicate; exemption." It provided in part as follows:

"\* \* \* Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state

by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. \* \* \*

Section 5328-2, General Code of Ohio, is entitled: "Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid." It provides in part as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section, having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and

under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

## THE DECISIONS OF THE SUPREME COURT OF OHIO

It is conceded that the tax imposed in the instant case is assessed against appellant but is an ad valorem tax. In the case of *The Procter & Gamble Company, Appellee, v. Evatt, Tax Commissioner, Appellant*, 142 O. S. 369, decided by the Supreme Court of Ohio on December 22, 1943, the court in the syllabus of the case<sup>4</sup> said:

"Where an Ohio corporation has district offices outside of Ohio, in charge of district managers who perform all administrative duties connected with such offices, supervise the selling and delivery of merchandise and collect therefor, deposit in banks in the respective districts funds arising from accounts receivable resulting from such sales, have authority to accept drafts on such bank accounts, and can and do apply such deposits on the expenses and needs of the district offices, such accounts receivable and the avails thereof are used in business in other states and arise out of business conducted in such other states, for and on behalf of the Ohio owner, and are exempt from taxation in Ohio under Sections 5328-1, 5328-2 and 5325-1, General Code.

4. The syllabus of a decision of the Supreme Court of Ohio is prepared by the judge assigned to write the opinion, and receives the assent of a majority of the court. It is the rule, therefore, that the syllabus states the law with reference to the facts upon which it is predicated. *The Baltimore & Ohio Railway Company v. Baillie, et al.*, 112 O.S. 567, 570.



although checks covering the expenses of the district offices are forwarded to the company treasurer for his signature, and funds are withdrawn to Ohio after the expenses of the district offices have been satisfied."

The court in its opinion interpreted said Section 5325-1, General Code of Ohio, said section 5328-1, General Code of Ohio, and said Section 5328-2, General Code of Ohio, and in its opinion in the last paragraph of page 371 and in the first two paragraphs of page 372 said the following:

"Each of the appellee's district offices outside of Ohio is in charge of a district manager who performs all administrative duties connected with the office. He supervises the selling and delivery of merchandise and makes collection therefor. He employs and discharges the employees connected with his office, and they are responsible to him."

"The district offices deposit the checks and money received in payment on their accounts receivable, in bank accounts in the district office cities. District managers have authority to accept drafts on the local bank accounts comprising such deposits, and apply these deposits in payment of the needs of their offices, including wages and salaries of employees, rent, warehouse and trucking charges, etc. All expenses of the district offices are paid by the district managers or under their direction. Checks covering such expenses are drawn on the local banks where the district offices are located, and are then forwarded to Cincinnati to be signed by the company treasurer. After being signed, the checks are sent to the payees."

"Deposits in the local banks are not withdrawn to Ohio until the expenses and needs of the district office are first satisfied."

In view of the facts that appellee was an Ohio corporation and that the ad valorem tax assessed by appellant

against appellee on accounts receivable resulting from the sale of property (1) by an agent having an office in another state, (2) delivered from a stock of goods maintained in a warehouse in such other state, (3) arising from business conducted in such other state, and (4) the avails thereof which are used in business in such other state, the facts meet all the tests in the exempting clauses of said sections, and the Ohio Supreme Court held that said accounts receivable were not taxable in Ohio, as under said sections such accounts receivable had a business situs outside of Ohio.

In the case of *The Ransom & Randolph Company, Appellant, v. Evatt, Tax Commissioner, Appellee*, 142 O. S. 398, decided by the Ohio Supreme Court on January 12, 1944, the court in the syllabus of the case said, among other things, the following:

"1. Under section 5328-1, General Code, intangible property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, is not subject to taxation in this state.

"2. Section 5328-2, General Code, fixes the business situs of accounts receivable. When such receivables are used in business and result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, such receivables shall be considered, for the purpose of taxation, to have arisen out of business transacted in a state other than that in which the owner thereof resides. The provisions of such section are to be reciprocally applied to the end that all accounts receivable having a business situs in this state shall be taxed in Ohio and no such property belonging to a resident of this state and having a business situs outside of this state shall be taxed in Ohio.

"3. Under section 5325-1, General Code, the term 'used in business' or 'used' when employed in stat-

utes relating to taxation includes accounts receivable when they or the avails thereof are being applied, or are intended to be applied in the conduct of a business, whether in this state or elsewhere. The term 'business' includes all enterprises of whatever character conducted for gain, profit or income and extends to personal service occupations.

"5. The fact that a resident of Ohio withdraws the avails of accounts receivable, otherwise exempt from taxation, from banks in which out-of-state branches of his business have deposited them, and uses such avails in his business generally, including the payment of the expenses of such out-of-state branches, does not effect a change of the business situs of such accounts receivable for the purpose of taxation. Such accounts receivable are to be considered as having a business situs in the state where created; if they meet the test laid down in section 5328-2, General Code.

"6. The fact that deposits in other states are not withdrawable by an officer or agent having an office in such other state does not affect the business situs of accounts receivable arising from business done in such other states even though such deposits be the avails of such accounts receivable.

In the *Ransom* case, *supra*, appellant was an Ohio corporation with its office, manufacturing plant and principal place of business located at Toledo, Ohio, and had qualified to do business in the state of Indiana where it had two branch retail stores and also in the state of Michigan where it had four retail stores. The court in its opinion in the second paragraph on page 402 said:

"As found by the Board of Tax Appeals in its entry in the instant case: 'Inasmuch as the accounts and notes receivable here in question accrued to the company on the sale of its property by managing agents of the company, having their several offices and places of business in certain designated



cities in the states of Indiana and Michigan, and such property was sold from stocks of goods maintained by the company in its storerooms in the several cities of the other states herein referred to, it clearly appears that within the purview of sections 5328-1 and 5328-2, General Code, these receivables arose out of business transacted in states other than that in which the appellant as the owner of such receivables, resided."

In the *Ransom* case the commissioner had assessed the three-mill ad valorem tax on said accounts receivable resulting from such sales made by agents or employes having an office or store in another state and from a stock of goods maintained in such other state. The court held said accounts receivable are not taxable in Ohio as they had a business situs outside of Ohio. At page 408 in its opinion in the *Ransom* case, supra, the court said:

"\* \* \* The only statutory conditions for out-of-state situs accounts receivable are that they shall be used in business and shall result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein (Section 5328-2, General Code). . . . However, we think that the accounts receivable in this case meet this test."

In the case of *The Haverfield Company, Appellant, v. Evatt, Tax Commissioner, Appellee*, 143 O. S. 58, decided by the Ohio Supreme Court on March 22, 1944, the Court in its syllabus said, among other things, the following:

"1. Accounts receivable are 'used in business,' within the meaning of the statutes of Ohio relating to taxation, when they or the avails thereof are being applied or are intended to be applied in the conduct of a business, whether in this state or elsewhere.

"\* . . . . .

"3. 'Accounts receivable' arising from business transacted in a state other than Ohio are 'used in business' within the provisions of section 5325-1, General Code, and therefore exempt from taxation in this state under the provisions of sections 5328-1 and 5328-2, General Code, where the avails of such 'accounts receivable' are used partly in payment of the expenses of the operation of such out-of-state business, and the balances, if any, remitted to and used by the Ohio corporation in its regular course of business, whether in this state or elsewhere. (*Ransom & Randolph Co. v. Evatt*, Tax Commr., 142 Ohio St., 398, approved and followed.)

The Haverfield Company was an Ohio corporation with its principal place of business in Columbus, Ohio, engaged in selling millinery at retail, and conducted and operated retail millinery departments in department stores both inside of Ohio and outside of Ohio. The commissioner imposed the three-mill tax against the Haverfield Company on its accounts receivable resulting from the sale of property by agents having an office or retail space in a state outside of Ohio and from a stock of goods maintained in such state outside of Ohio. The court considered the above quoted sections and found that the accounts receivable were used in business and had a business situs outside of the state and consequently were not taxable in Ohio.

In the case of *C. F. Kettering, Inc., Appellant, v. Evatt, Tax Commissioner, Appellee*, 144 O. S. 419, decided by the Ohio Supreme Court on February 7, 1945, the court considered the above mentioned sections of the General Code of Ohio. The *Kettering* case, *supra*, involved an Ohio franchise tax assessment against a foreign (Delaware) corporation having its principal business office and place of business in Ohio and said corporation's business activities consisted principally of holding and own-

ing shares of stock and other investments, including negotiable instruments, bonds, debentures and obligations, and real estate and collecting and receiving the income therefrom. The court in the second paragraph of the syllabus said the following:

"2. Under the provisions of sections 5498, 5328-1 and 5328-2, General Code, as they are connected and related, a general bank deposit or account maintained in Ohio by a corporation organized under the laws of another state and used by it for the purposes of its business generally, within and without Ohio, may not be included in the base for the computation of the franchise tax to be collected from such foreign corporation, even though such deposit or account may fluctuate in amount and the funds therein are withdrawable by the Ohio officers or agents of the corporation."

In the cases of *National Cash-Register Company, Appellant, v. Evatt, Tax Commissioner, Appellee*, 145 O. S. 597, decided by the Ohio Supreme Court on August 8, 1945, the court in the syllabus thereof said:

"1. In computing the franchise tax to be assessed against a corporation organized under the laws of another state but carrying on its principal activities in Ohio, accounts receivable, arising out of business transacted in this state on behalf of such corporation where the avails thereof are applied or intended to be applied in the conduct of its business either within or without this state, should be included in the base for the computation of such tax.

"2. Under the provisions of sections 5498, 5328-1 and 5328-2, General Code, general deposits of a foreign corporation, located in banks outside of Ohio, maintained and used by such corporation for purposes of its business generally, both within and without Ohio, should not be included in the base for the computation of the franchise tax to be assessed against such corporation, even though such deposits may fluctuate in amount and the funds therein are



withdrawable by Ohio officers and agents of such corporation. (C. F. Kettering, Inc., v. Evatt, Tax Commr., 144 Ohio St. 419, approved and followed.)"

The National Cash Register Company, was a Maryland corporation with its manufacturing plant and executive and accounting offices located at Dayton, Ohio. The case involves, among other things, sales made outside of Ohio by sales offices outside of Ohio, which sales were filled from stocks of goods located outside of Ohio. The court considered the above mentioned sections of the General Code of Ohio and for Ohio franchise tax purposes held in substance that (1) accounts receivable resulting from the sale of property sold by an agent having an office in a state other than Ohio and from a stock of goods maintained in such other state are considered to have a business situs outside of the state of Ohio, and (2) accounts receivable resulting from a sale of property sold by an agent having an office in another state but filled from stocks of goods maintained in Ohio have a situs in Ohio for tax purposes. The court at page 603 in its opinion said inter alia:

"Appellant lays great stress upon section 5328-2, General Code, and the reciprocal provision thereof.

"Sections 5328-1 and 5328-2, General Code, are *in pari materia* and must be construed together.

"Section 5328-1, General Code, insofar as applicable here, provides:

"Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person shall be subject to taxation"

"It should be emphasized that that section provides for taxation property of a non-resident (foreign corporation). Accounts receivable used in and arising out of business transacted in Ohio on behalf of a foreign corporation are subject to taxation in this state."

In the case of *The American Rolling Mill Company, et al. Appellants, v. Evatt, Tax Commissioner, Appellee*, 147 O. S. 207, decided by the Ohio Supreme Court on December 11, 1946, the court considered said sections 5328-1 and 5328-2, General Code of Ohio, in a case involving certain bank deposits of an Ohio corporation maintained in Missouri and Oklahoma, and held that they were subject to taxation under said sections 5328-1 and 5328-2, General Code of Ohio.

In the opinion handed down by Judge Turner in the *Ransom* case, *supra*, at page 409 appears the following paragraph:

"It is clear that it was the intention of the General Assembly that all property having a business situs in Ohio should be taxed in Ohio and that no property having a business situs outside of Ohio should be so taxed."

## ARGUMENT.

Appellant's credits assessed for taxation in Ohio included the sum of all of appellant's notes and accounts receivable, due on demand or within one year from the date or dates of the inception thereof, resulting from sales and shipments from its plants in Ohio to its customers of products produced at appellant's Ohio manufacturing plants or of products from a stock of goods maintained by appellant at its said Ohio manufacturing plants and the values of the prepaid insurance policies in so far as such insurance policies covered its Ohio manufacturing plants over and above the sum of accounts payable due on demand or within one year from the date or dates of inception thereof. All of such accounts payable arose from appellant's business activities in Ohio and operations at its said Ohio manufacturing plants. Said receivables or the avails thereof were used in appellant's business in Ohio and elsewhere. The assessments were made under various sections of the Ohio General Code, but the most pertinent of such sections are 5325-1, 5328-1, 5328-2 and 5638-1.

**(a) Sections 5328-1 and 5328-2 of the General Code of Ohio, as Construed and Applied in This Case, Are Valid Under the Due Process Clause of the Fourteenth Amendment.**

These two sections are in pari materia and should be construed together. See *National Cash Register Company v. Evatt*, supra.

The tax is assessed against appellant and is an ad valorem property tax on the value of its credits in Ohio. The receivables included in the credits so assessed re-



sulted from orders for sale and delivery of its products received at appellant's offices in Wheeling, West Virginia, or at its various sales offices, at least one of which was situated in the state of Ohio, and transmitted by such sales offices to Wheeling, West Virginia, where they were accepted by appellant; then such orders so accepted were transmitted to appellant's Ohio plants for consummation of the contracts of sale and delivery of the products to the various persons placing the orders; and then such orders were filled from the stock of products maintained at appellant's Ohio manufacturing plants or were manufactured and delivered from the stock of goods so manufactured. The products were then shipped or delivered from its Ohio plants to appellant's customers and the sales completed. The contracts of sale were accepted by appellant outside of Ohio but the sales were consummated by appellant within Ohio. The records of the accounts receivable were kept at appellant's Wheeling offices and the receivables were payable there and when the funds were received they were used for general business purposes of the corporation, including the payment of the expenditures and the expense of appellant's Ohio manufacturing plants. Appellant transferred sufficient of such funds to its Ohio bank accounts maintained for purpose of meeting its payrolls at its Ohio manufacturing plants and checks were drawn and issued at its Ohio manufacturing plants and delivered for the payment of such payrolls. Appellant's inventories in Ohio on January 1, 1942, amounted to approximately \$20,281,198.30, whereas its inventories outside of Ohio on said date amounted to approximately \$12,897,251.78. The book value of appellant's manufacturing plants and equipment in Ohio amounted to approximately \$48,373,427.63

and the book value of its plants and equipment outside of Ohio amounted to approximately \$19,392,955.86. Appellant's Ohio tax return showed total book value of \$68,968,402 for assets in Ohio and of \$69,395,495 for assets outside of Ohio. If appellant's receivables of \$5,250,525 arising from such business transacted in Ohio had been included in said book value of assets in Ohio, the appellant's total of its assets in Ohio would have exceeded the total of its assets outside of Ohio.

Appellant paid ad valorem taxes on its tangible personal property in Ohio. Appellant was authorized to transact business in Ohio and paid an annual franchise fee for so doing. Appellant was subject to taxation in Ohio. Appellant's said receivables totaling \$5,475,853 had a business situs in Ohio and were subject to taxation in Ohio and its prepaid insurance premiums of \$225,328 on policies of insurance covering its Ohio plants had a business situs in Ohio and were subject to taxation therein.

The appellant in its brief relies upon the decision of this court in the case of *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, "a case involving the identical factual set-up." In that case this court in its opinion said the following relative to Ohio taxes on receivables of Wheeling Steel Corporation (pp. 207 and 208):

"The total amount of the corporation's accounts and notes receivable on January 1, 1933, was \$2,234,743.11. Of this amount, \$374,410.42 were receivables for goods sold and manufactured in, and shipped from, West Virginia to resident and non-resident purchasers. It appeared that the corporation had been assessed in Ohio, as of January 1, 1933, on accounts and notes receivable amounting to \$250,133.42.

"The Supreme Court of Appeals of West Virginia held that there had been 'such a localization of the corporation's business at Wheeling' that there was imparted 'to its entire intangible property a prima facie situs for taxation at that place.' But the court thought that the 'statutory limitation of the assessment to property 'liable to taxation'' indicated that the legislature 'did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction.' And referring to the above mentioned taxation in Ohio, the Supreme Court of Appeals said: 'For the purposes of this opinion, we assume that the claim of our sister state is well founded, and should be deducted from the assessment as corrected by the Tax Commissioner.' And in remanding the cause to the Circuit Court, the Supreme Court of Appeals gave opportunity to have it determined 'whether or not further deductions should be made in deference to the legal demands of other states.' In the further proceeding in the Circuit Court, it was stipulated that 'no states other than Ohio and West Virginia have assessed taxpayer upon any of its intangibles for the year 1933.'"

Then this court said the following at page 214:

"The state court permitted the deduction of the amount of the intangible property of the corporation which had been assessed in Ohio. That assessment, according to the agreed statement, was 'on accounts and notes receivable.' Counsel for the state, while insisting that the record does not show a taxable situs in Ohio of any of appellant's accounts receivable, has not taken a cross appeal or sought to assign error with respect to this part of the judgment of the Supreme Court of Appeals. The state is not in a position to complain of the deduction and no question as to its propriety is before us upon this record. Appellant urges that in Ohio 'only the excess of receivables and prepaid items over current payables' is actually taxed, and that the deduction



of 'current indebtedness' accounts for the amount of the Ohio assessment. The inference is sought to be drawn that the amount of accounts receivables taken into consideration in Ohio was thus larger than the amount assessed. We find no basis for a conclusion whether, or to what extent, deductions were allowed in Ohio."

• There is no evidence in the record that the so-called Ohio receivables were taxed in 1942 by the state of Delaware and while they were taxed by the state of West Virginia, still if they had been listed by appellant for taxation in Ohio and the tax thereon paid and the West Virginia taxing authorities had been informed thereof, the commissioner has not been able to find any reason why the credit would not be given by West Virginia in determining appellant's taxes on its receivables as of January 1, 1942, as was given as of January 1, 1933. The decision of this court in *Wheeling Steel Corporation v. Fox*, supra, is entirely favorable to the commissioner. It holds (1) that appellant's receivables and intangibles are subject to taxation in Delaware, even though there is in neither case any evidence that Delaware exercised its taxing power, and (2) that its receivables arising from its sales and shipments from its Ohio plants were subject to the Ohio tax and its receivables were subject to tax and were taxed in West Virginia after giving credit for Ohio taxes paid on intangibles.

The present system of taxation in Ohio became effective for the taxable year 1932 and there have been no substantial changes since then.

In the case of *Citizens National Bank of Cincinnati v. Durr*, 257 U. S. 99, this court held that membership in the New York Stock Exchange, when owned by a resident of Ohio, has a taxable situs in Ohio even though it

may be subject to taxation in New York. In its opinion at page 108 the court said:

"That a membership held by a resident of the state of Ohio in the Exchange is a valuable property right, ~~un~~assignable in its nature, but of so substantial a character as to be a proper subject of property taxation, is too plain for discussion. That such a membership, although partaking of the nature of a personal privilege, and assignable only with qualifications, is property within the meaning of the Bankrupt Laws, has, repeatedly been held by this court. \* \* \* Whether it is subjected to taxation by the taxing laws of Ohio is a question of state law, answered in the affirmative by the court of last resort of that state, by whose decision upon this point we are controlled. \* \* \*

"The chief contention here is based upon the due process of law provision of the 14th amendment: it being insisted that the privilege of membership in the Exchange is so inseparably connected with specific real estate in New York that its taxable situs must be regarded as not within the jurisdiction of the state of Ohio. \* \* \*

And at page 109 this court said:

"Nor is the plaintiff's case stronger if we assume that the membership privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio. \* \* \* Exemption from double taxation by one and the same state is not guaranteed by the 14th amendment. \* \* \* much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both forbidden \* \* \*"

Appellant in its brief cites the case of *Newark Fire Insurance Company v. State Board of Tax Appeals*, 307 U. S. 313. In that case this court held that a tax levied by the state of New Jersey upon the paid-up capital stock and accumulated surplus of a New Jersey fire insurance

company whose executive and general business offices at which its accounts are kept and its general affairs conducted are in New York and whose cash and securities are located there or in banks, only a small amount being deposited in New Jersey banks, was held not to violate the due process clause of the Fourteenth Amendment, even though the intangibles of the corporation had acquired a taxable situs outside of New Jersey. In a separate opinion announced by Mr. Justice Frankfurter, in which Mr. Justice Stone, Mr. Justice Black and Mr. Justice Douglas concurred, it is stated on page 324:

" \* \* \* it is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the constitution our task is ended."

The appellant in its Brief cites the case of *Beidler v. South Carolina Tax Commission*, 282 U. S. 1. In that case this court held that the mere fact that a debtor is domiciled in South Carolina does not give said state jurisdiction to impose an inheritance or succession tax upon the transfer of the debt by a decedent who was domiciled in another state. The court in its opinion at page 8 said:

"It is sought to sustain the tax by South Carolina upon the ground that the indebtedness had what is called a 'business situs' in that state, and the state court adverted to this basis for the tax. In *Farmers Loan & T. Co. v. Minnesota*, 280 U. S. 204, 74 L. ed. 371, 65 A. L. R. 1000, 50 S. Ct. 98, supra, this court reserved the question of business situs, saying: '*New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 S. Ct. 110, *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 S. Ct. 585, *Liverpool & L. & G. Ins. v. Board of Assessors*, 221 U. S. 346, 55 L. ed. 762, L. R. A. 1915C, 903, 31 S. Ct. 550, recognize the principle that choses in action may acquire a situs



for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile. But a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

The appellant also cites in its brief the case of *Curry v. McCanless*, 307 U. S. 357, in which intangibles of a trust created in Alabama and owning and holding such stocks and bonds in Alabama by a decedent domiciled in Tennessee was held to have two tax situs for inheritance tax purposes and this court specifically said (pp. 372 and 373):

"We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. . . .

That has remained the law of this court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons. . . ."

The appellant also cites the case of *Wisconsin v. J. C. Penney Company*, 311 U. S. 435, in which this court held that a Wisconsin state tax on the privilege of declaring

and receiving dividends out of income derived from property located and business transacted in the state is not, as applied to a foreign corporation licensed to do business in this state, a violation of the due process clause. This court in its opinion at page 446 said:

"\* \* \* Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the state of Wisconsin has made possible, in so far as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes. \* \* \*"

In the case of *Parke, Davis and Co. vs Atlanta*, 200 Ga. 296, it was said in the first and fourth branches of the syllabus:

"(1) Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the State, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to non-resident purchasers, accounts receivable thereon arise out of business conducted in the City of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by non-resident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the City of Atlanta and the State of Georgia."

"(4) Where a non-resident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the fourteenth amendment of the Constitution of the United States, or paragraphs 2 and 3 of section 1 in article I of the

Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the State." (Emphasis added.)

As stated in *Southern Pacific Company v. McColgan*, 68 Calif. App. (2d) 48 (1945), at page 70:

" \* \* \* In other words, when the *mobilia* rule was not in accord with the realities of the situation it was either disregarded or held not to preclude another state which had become definitely connected with these intangibles from taxing them or their income. This concept that another state than the state of legal domicile had jurisdiction to tax intangibles was enunciated in a series of cases holding that where the intangibles had acquired a 'business situs' in a foreign state, that state could tax. (Citing cases.)"

And at page 71 it is stated:

" \* \* \* At any rate we do know, under the rule of the cases heretofore cited, that the fact that double taxation of the intangibles might result is not necessarily a constitutional bar to both states imposing a tax on the same intangibles."

The appellee, the commissioner, contends that the Ohio statutes as interpreted and applied are not in violation of the due process clause of the Fourteenth Amendment as:

(1) The tax imposed is assessed against a foreign corporation, licensed to do business in Ohio and subject to taxation in Ohio, and is an ad valorem tax on the value of credits.

(2) Credits include notes and accounts, due on demand or within one year from the date of inception thereof, and prepaid items, less notes and accounts payable due on demand or within one year after the inception thereof.



(3) The tax rate of three mills on the dollar of value of such credits is applied to credits having a situs in Ohio as defined by the Ohio statutes whether such credits belong to a non-resident or a resident.

(4) The proceeds of such tax, in the case of a corporation filing an inter county consolidated personal property tax return, as appellant did for the year 1942, which is herein involved, went into the general revenue fund of the state of Ohio.

(5) Ohio conferred numerous benefits and protections upon appellant and its credits upon which the tax in dispute herein was assessed, in view of the facts that the receivables included in said credits arose from sales consummated at appellant's plants in Ohio, that the greater part of appellant's manufacturing plants were situated in Ohio, that most of appellant's inventories were maintained in Ohio, that appellant maintained a sales office in Ohio, that appellant's subsidiaries maintained two sales offices in Ohio, that appellant and its subsidiaries had tangible personal property in thirteen different Ohio counties, that appellant maintained bank accounts in Ohio, and that payroll checks were both drawn and issued in Ohio and delivered in Ohio, that appellant was authorized to and did transact business in Ohio, that appellant manufactured a large part of its products in Ohio and that it maintained large inventories of raw, semi-finished and finished goods in Ohio as of tax listing day, January 1, 1942, and prior thereto.

(6) The credits arose from business and contracts consummated in Ohio

(7) The credits had a business situs in Ohio.

(8) Credits may have more than one situs for purpose of taxation. See *Curry v. McCannless*, supra; *Newark Fire Insurance Company v. State Board of Tax Appeals*,

supra; *State Tax Commission v. Aldrich*, 316 U. S. 174; *Cream of Wheat v. County of Grand Forks*, 253 U. S. 325; *Citizens National Bank of Cincinnati v. Durr*, supra; *Wheeling Steel Corporation v. Fox*, supra.

(9) The physical evidence of the credits or receivables does not have to be present in the state claiming to be the business situs of the credits or receivables on which the tax is imposed. See *Metropolitan Life Insurance Company v. New Orleans*, 205 U. S. 395; *Liverpool & L. & G. Insurance Company v. Orleans Assessors*, 221 U. S. 346; *Newark Fire Insurance Company v. State Board*, 307 U. S. 313; *Parke, Davis and Co. v. Atlanta*, supra; *Colgate-Palmolive-Peet Company v. Davis*, 196 Ga. 681 (1943); *Southern Pacific Company v. McColgan*, supra.

(10) The credits taxed and the avails thereof were used in appellant's business in Ohio and elsewhere.

**(b) The Statutes in Question Are Constitutional Under the Commerce Clause.**

This is an Ohio ad valorem intangible property tax upon credits including accounts receivable resulting from the sale by appellant of its products manufactured or manufactured and stored in Ohio and prepaid insurance premiums. It is an ad valorem tax on property having a situs in Ohio. It is not a tax upon gross receipts, income or the privilege of doing business. It is difficult to see how when an ad valorem tax assessed against appellant, a foreign corporation licensed to transact business in Ohio and having the greater part of its tangible personal property in Ohio and when the tax at the rate of three mills per dollar of valuation is uniformly applied on all credits having a situs in Ohio, the commerce clause is offended.

The record does not disclose what part, if any, of appellant's products manufactured and delivered from its plants in Ohio was shipped outside of the state of Ohio. See *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250.

Further, it is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens, even though their just share of such burdens increases the cost of doing interstate business. See *Western Live Stock v. Bureau of Revenue*, *supra*.

In this court's opinion in *Western Live Stock v. Bureau of Revenue*, *supra*, at page 259, the court said:

Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former.

In its brief appellant relies upon a decision by this court in the case of *J. D. Adams Manufacturing Company v. Storen*, 304 U. S. 307, in which this court held that an Indiana gross receipts tax of 1% violated the commerce-clause as it lays a tax on all gross receipts of an Indiana corporation selling 80% of its products in interstate commerce and such tax is not apportioned by the statute imposing it. In its brief appellant also cites the case of *Gwin, White & Prince, Inc., v. Henneford*, 303 U. S. 434, in which this court held that a Washington state tax imposed for the privilege of engaging in business activities measured by gross receipts upon a domes-



tic corporation whose only activities consisted of acting as the representative of growers in the state and marketing in other states fruits grown in the taxing state is unconstitutional and in violation of the commerce clause. It is difficult to see any similarity between the *J. D. Adams Manufacturing Company* case and the *Gwin, White & Prince, Inc.*, case and the instant case.

In *Memphis Natural Gas Company v. Stone*, 335 U. S. 80, this court held that a Mississippi franchise tax measured by the value of capital used, invested or employed within the state was not an unconstitutional burden on interstate commerce in the case of an interstate natural gas pipeline company, a portion of whose line passed through the state but which did no local business therein. In the opinion handed down by Mr. Justice Reed with the concurrence of Mr. Justice Murphy and Mr. Justice Douglas who were in the majority, it was said "that the burden imposed on interstate commerce was no more unreasonable than the concededly permissible ad valorem taxation of the company's property within the state."

Mr. Justice Frankfurter in his dissenting opinion, in which Mr. Justice Vincent and Mr. Justice Burton concurred, said "that the pipeline company received from the state no protection, opportunities or benefits other than those for which it paid ad valorem taxes."

An ad valorem tax is not an unconstitutional burden on interstate commerce when it is levied against a foreign corporation on its receivables having a business situs within the levying state. See *Citizens National Bank v. Durr*, supra; *Virginia v. Imperial Coal Sales Company*, 293 U. S. 15; *Parke, Davis and Co. v. Atlanta*, supra; *Colgate-Palmolive-Peet Company v. Davis*, supra.

In the case of *Parke, Davis and Co. v. Atlanta*; supra; the third branch of the syllabus reads as follows:

"If, under the facts of the case, a tax situs did exist in the municipality seeking to tax the accounts receivable, it would be immaterial whether they arose in interstate commerce, since the commerce clause (U. S. Const. art. I, sec. 8., cl. 3) does not exempt either tangible or intangible property from a non-discriminatory ad valorem tax by a municipality. Hence there would be no burden upon interstate commerce for the accounts receivable to be taxed as sought by the municipality, under the facts stated in the petition."

*Parke, Davis and Company* is a Michigan corporation engaged in a foreign commerce and commerce among the states manufacturing its goods in the state of Michigan and selling such goods abroad and to all the states of the United States. See *Parke, Davis and Co. v. Cook*, 198 Ga. 457.

In the case of *Colgate Palmolive-Peet Company v. Davis*, supra, in its opinion at page 685 the court said:

"\* \* \* If under the facts of the case a tax situs did exist in Georgia (and we hold that it did) as to the credits sought to be taxed, it would be immaterial whether they arose in interstate commerce, since the commerce clause does not exempt either tangible or intangible property from a non-discriminatory tax by a state. *Suttles v. Northwestern Mutual Life Insurance Co.*, supra (193 Ga. 495); *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15.  
\* \* \*

*Colgate-Palmolive-Peet Company* is a Delaware corporation with its principal office at Jersey City, New Jersey, and the purchase orders, from which its said receivables arose, were sent from its sales office or offices in Georgia to its Jefferson, Indiana, office to be approved and filled.

In the case of *General Trading Company v. State Tax Commission*, 322 U. S. 335, this court, in its majority opinion handed down by Mr. Justice Frankfurter, at page 338 said:

"\* \* \* Of course, no state can tax the privilege of doing interstate business. See *Western Live Stock v. Bureau*, 303 US 250, 82 L ed 823, 58 S Ct 546, 115 ALR 944. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a state to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co. v. Maxwell*, 311 US 454, 85 L ed 275, 61 S Ct 334."

The commissioner urges that, in view of the facts in the instant case and the decisions of this court, there is in this case no violation of the commerce clause.

**(c) The Statutes in Question Are Not Invalid Under the Equal Protection Clause of the Fourteenth Amendment.**

The statutory provisions which, as construed and applied, imposed the tax here complained of, having been construed in a number of cases by the Supreme Court of Ohio. The pertinent statutes are Section 5325-1, General Code of Ohio, Section 5328-1, General Code of Ohio, and Section 5328-2, General Code of Ohio. The Ohio Supreme Court has construed and applied said statutes in cases where ad valorem taxes were assessed against corporations and franchise taxes were assessed against



corporations. Such decisions are discussed earlier in this brief under the heading of "The Decisions of the Supreme Court of Ohio." The apparent purpose of said three sections is to make one of two factors sufficient for taxation of receivables when arising out of business when such receivables or the avails thereof are used in business. We are here concerned with only the following (1) a sale of property by an agent or (2) a sale from a stock of goods, in testing the soundness of appellant's argument that said section so operates as to discriminate against it.

As applied to a domestic corporation either of the aforementioned factors is claimed by appellant to be sufficient to cause accounts receivable to arise out of business transacted in a foreign state. Hence, having a taxable situs in a state other than Ohio, such receivables would be exempt from taxation in this state. Applying the statute conversely and to a foreign corporation either of these two factors is sufficient to establish that receivables shall be considered as arising out of business transacted in this state. It is evident, therefore, that it was the legislative intent to treat domestic corporations and foreign corporations on an equal basis—either of two factors would be sufficient to make such receivables arise out of business transacted in a foreign state or arise out of business transacted in this state. It is felt, therefore, that *on its face* it can not be said that said section is discriminatory. A statute, for example, which specifically provided for a tax at one rate as to domestic corporations and for a tax at a higher rate as to foreign corporations would probably be one which *on its face*, and entirely independent of any operative facts, would be discriminatory. That is not the situation here.

A domestic corporation carrying on all of its business activities in this state and making sales from a stock of goods maintained herein, with receivables resulting therefrom, would clearly be subject to the provisions of Section 5328-2, General Code of Ohio, in that said receivables would arise out of business transacted in this state. Its receivables would have an Ohio situs under the sections of the General Code of Ohio here under consideration. Similarly, a foreign corporation whose receivables resulted from a sale from a stock of goods maintained in this state would also be subject to having said receivables considered as arising out of business transacted in this state. The section would operate with equal force against either corporation. It could hardly be said that under such circumstances there would be any discrimination.

It will have to be recognized that there is some force to the argument that Section 5328-2, General Code of Ohio, is susceptible of an interpretation that perhaps could result in discrimination in that a domestic corporation would be favored over a foreign corporation. Appellant's argument in support of such claim appears at pages 22 to 26, both inclusive, of its brief, to wit:

"In the *Ransom & Randolph* case the court decided that Section 5328-2 fixes the tax situs of accounts receivable and that the receivables of an Ohio resident are exempt from property taxes in Ohio when (a) arising out of business transacted in another state and (b) used in business, whether in the foreign state or elsewhere. In other words, a resident's receivables need not *be used in business* in a foreign state to qualify for tax exemption: all that is necessary is that the receivables arise out of business in the foreign state and be used in business anywhere. Specifically, the court said in its opinion (p. 408) that:

'The only statutory conditions for out of state situs of accounts receivable are that they shall be used in business and shall result from sale of property sold by an agent having office in such other state or from a stock of goods maintained therein.'

"In the present case, the board decided (R. 70, 71, 72) that the accounts receivable of a non-resident are taxable in Ohio when (a) arising out of business transacted in Ohio and (b) used in business anywhere, and the court affirmed the board's decision (R. 22).

"Thus the 'business situs' of accounts receivable is determined solely by the place where they 'arise out of business' as defined by Sections 5328-2 which, as construed and applied, means one thing in the case of a foreign corporation, another thing entirely in the case of a domestic corporation. Specifically, in the case of an Ohio resident *no significance is attached to what is done in Ohio*. The fact that a stock of goods is maintained in Ohio is immaterial if the goods are sold by an agent having an office in another state. Receivables resulting from the sale are exempt from taxation in Ohio because of what is done outside of the state and what is done in Ohio is disregarded. Likewise, it is immaterial that sales are made by an agent having an office in Ohio if the sales are made from a stock of goods outside of the state. The fact that the stock of goods, from which the sales are made, is outside of Ohio is controlling and receivables resulting from the sales are exempt from taxation in Ohio notwithstanding that the sales are made in the state. In the case of a non-resident, however, *only what is done in Ohio is material*. The fact that sales are made by an agent having an office in another state is of no significance if the sales are made from a stock of goods in Ohio. Receivables resulting from the sales are taxable in Ohio because the sales are made there and the fact that the stock of goods is located in another state is of no consequence. So also, where sales are made by an agent having an office in another state from a



stock of goods maintained in Ohio, receivables resulting from the sales are taxable in Ohio because of the location of the stock of goods in the state. The fact that the sales are made outside of Ohio is immaterial.

"In other words, Sections 5328-1 and 5328-2 require that accounts receivable of a resident, when and wherever used in business, be exempted from taxation in Ohio:

"(a) if resulting from the sale of property sold by an agent having an office in a state other than Ohio, or

"(b) if resulting from the sale of property from a stock of goods maintained in a state other than Ohio;

and (2) that accounts receivable of a non-resident, when and wherever used in business, be taxed in Ohio:

"(a) if resulting from the sale of property sold by an agent having an office in Ohio, or

"(b) if resulting from the sale of property from a stock of goods maintained in Ohio.

"So construed, a resident of Ohio may maintain a stock of goods in Ohio and sell them through an agent having an office in another state, or he may maintain the stock of goods in another state and sell them through an agent having an office in Ohio and in either case all receivables resulting from the sales are exempted from taxation in Ohio by Sections 5328-1 and 5328-2. On the other hand, if a non-resident does business in exactly the same manner as the resident, maintaining a stock of goods in Ohio and selling the goods through an agent having an office in another state, or maintaining the stock of goods in another state and selling them through an agent having an office in Ohio, then, in either case, all of the receivables resulting from the non-resident's sales are taxable in Ohio under Sections 5328-1 and 5328-2. These instances are not unique as it is ordinary practice for businesses to have a stock of goods in one state and to sell them in another at a sales office maintained for that pur-

pose. Thus, accounts receivable arising out of one business are taxed in Ohio because the owner is a non-resident, while receivables arising out of a competing business, conducted in exactly the same manner as the other, are exempted from taxation in Ohio because the owner is a resident of the state.

"Pursuant to this construction of the statutes, all of appellant's receivables resulting from sales of steel and steel products manufactured in its Ohio plants were assessed for taxation in Ohio on the ground that they resulted from the sale of property from a stock of goods maintained in Ohio (R. 22, 58, 72). Appellant vigorously opposed this conclusion in view of the stipulation (R. 63) that:

'11. Products shipped from appellant's Ohio manufacturing plants to fill the orders from which resulted the greater part, in dollar value, of the notes and accounts receivable owned by appellant and its subsidiaries on tax-listing day in 1942 were manufactured at said plants after receipt of, and to fill specific orders therefor and had not been manufactured prior to the receipt of orders and kept on hand to fill orders. A smaller part, in dollar value, of said notes and accounts receivable resulted from sales of products which had been manufactured prior to the receipt of orders therefor and kept on hand at said plants to fill any orders therefor that appellant might receive.'

"Assuming, however, that appellant did maintain a stock of goods in Ohio; it nevertheless sold the goods by taking orders for them at sales offices in eleven states outside of Ohio subject to acceptance at its principal office in Wheeling, West Virginia where all of the sales were concluded. Therefore, had appellant been an Ohio corporation, all of the receivables in question would have been exempted from taxation in Ohio by Section 5328-2 on the ground that they resulted from sales of property sold by an agent having an office in another state.

"This is the discrimination of which appellant complains. Its receivables were assessed for taxa-

tion only because it is a foreign corporation. Receivables of competing domestic corporations doing business in exactly the same manner as appellant are not subject to taxation in Ohio. Thus appellant's receivables are subject to taxation in Ohio while identical property of local enterprises is exempt from taxation."

This court approved of the decision of the Supreme Court of West Virginia in the case of *In re Wheeling Steel Corporation Assessment*, 115 W. Va. 553 (1934), wherein it was said at page 557:

"On the other hand, the Federal Court cautions against an assessment 'intrinsically arbitrary' of a unitary corporation enterprise which is conducted in several states, and warns that an apportionment of its intangible property among such states for purposes of taxation may be requisite. See *Hans Rees' Sons Inc. vs. North Carolina*, 283 U. S. 123, 75 L. Ed. 879. The statutory limitation of the assessment to property 'liable to taxation' indicates that the legislature had this contingency in mind and did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction."

In the case of *The Ransom & Randolph Company, Appellant, v. Evatt, Tax Commissioner, Appellee*, supra, the court in its opinion handed down by Judge Turner, at page 409, said the following in respect to said statutes:

"It is clear that it was the intention of the General Assembly that all property having a business situs in Ohio should be taxed in Ohio and that no property having a business situs outside of Ohio should be so taxed."

The Ohio statutes are intended (1) not to tax accounts receivable, used in and arising out of business, whether of a foreign or domestic corporation, having a situs out-



side of Ohio; (2) to tax accounts receivable of a domestic corporation unless such receivables have a situs outside of Ohio; and (3) to tax accounts receivable of a foreign corporation if they have a situs within Ohio. All such receivables having a situs outside of Ohio are presumably subject to tax in another state.

The Ohio Supreme Court has construed and applied the pertinent Ohio statutes in cases in which the orders were accepted outside of Ohio by an Ohio corporation and delivery was made from a stock of goods maintained by said Ohio corporation at the place outside of Ohio where such orders were accepted and in such cases has held that the situs of the receivables arising from such sales is outside of Ohio and not subject to the ad valorem tax. See *Ransom & Randolph v. Evatt*, supra; and *The Haverfield Company v. Evatt*, supra.

However, the Ohio Supreme Court has not construed and applied such statutes in any case involving said ad valorem tax upon receivables arising where an Ohio corporation accepted outside Ohio an order for sale and filled such order from a stock of goods maintained within Ohio. Appellant complains that the Ohio statutes have been so construed and applied and that the construction which it assumes to have been made and to have exempted such receivables from the Ohio ad valorem tax is discriminatory as against appellant, a foreign corporation, because appellant has been held subject to such tax on its receivables arising from orders accepted outside Ohio by it when such orders were filled by it in Ohio from goods on hand in Ohio.

It is difficult to see how there has been any discrimination by the Ohio Supreme Court in construing and applying such statutes.

In the case of *Fidelity & Columbia Trust Company v. City of Louisville*, 245 U. S. 54, this court in its opinion handed down by Mr. Justice Holmes at pages 59 and 60 said:

"\* \* \* It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 146, 162, et seq., 55 L. ed. 389, 411, 417, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. Whichever this tax technically may be, the authorities show that it must be sustained.

"It is said that the plaintiff in error has been denied the equal protection of the laws because, if the argument is correct, which we have not considered, the decision in this case is inconsistent with earlier decisions of the Kentucky court. But with the consistency or inconsistency of the Kentucky cases we have nothing to do. *Lombard v. West Chicago Park*, 181 U. S. 33, 44, 45, 45 L. ed. 731, 738, 21 Sup. Ct. Rep. 507. We presume that, like other appellate courts, the Kentucky court of appeals is free to depart from precedents if, on further reflection, it thinks them wrong."

In the case of *Citizens National Bank v. Durr*, supra, this court in its majority opinion at pages 109 and 110 said:

"That plaintiff is denied the equal protection of the laws, within the meaning of the 14th Amendment, cannot be successfully maintained upon the record before us." The argument is that other brokers in the same city are not taxed upon the value of their memberships in the local stock exchange, nor upon the privilege of doing business in New York Stock Exchange securities. As to the local exchange memberships, it may be that the failure to tax them is but accidental or due to some negligence of subordinate officers, and is not prop-

erly to be regarded as the act of the state. If it be state action, there is a presumption that some fair reason exists to support the exemption, not applicable to a membership in the New York Exchange, and plaintiff has shown nothing to overcome the presumption. As to the privilege referred to, it already has been shown that the rights incident to plaintiff's property interest give him pecuniary advantages over others in the same business. Manifestly this furnishes a reasonable ground for taxing him upon the property right, although others enjoying lesser privileges because of not having it may remain untaxed."

### CONCLUSION.

From the foregoing, it is apparent that the Ohio statutes, as construed and applied, do not offend or violate the commerce clause of the Federal Constitution and do not offend or violate the due process clause or the equal protection clause of the Fourteenth Amendment to the Federal Constitution. It follows that the state of Ohio having the power to tax the credits in question, the assessment should be sustained.

Respectfully submitted,

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## APPENDIX.

### Ohio Statutes.

Section 5325-1. *Application of term "used in business"; definition of word "business."* Within the meaning of the term "used in business," occurring in this title, personal property shall be considered to be "used" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. "Business" includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.

Section 5328. *All taxable property to be entered on general tax list and duplicate.* All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless

of the residence of the owners thereof. All ships, vessels and boats, and shares and interests therein, defined in this title as "personal property," belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title.

Section 5328-1. *Property to be entered on classification tax list and duplicate; exemption.* All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; but the good will of a business shall not be considered to be property separate from the other property used in or growing out of such business. Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the in-

tangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

Section 5328-2. *Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid.* Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

In the case of prepaid items, when the right acquired thereby relates exclusively to the business to be transacted in such other state, or to property used in such business.

In the case of accounts payable, the proportion of the entire amount of accounts receivable, wherever arising, represented by those arising out of business transacted in such other state ascertained as herein provided shall be taken to represent the proportion of the entire amount of accounts payable arising out of the business transacted in such other state.

In the case of deposits (other than such as are used in business outside of such other state), when withdrawable in the course of such business by an officer or agent



having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business wherever transacted, shall be considered located in the state wherein the owner resides, if an individual, or wherein its actual principal executive office is situated, if a partnership or association, or under whose laws it is organized, if a corporation, by whomsoever they may be withdrawable.

In the case of moneys, when kept on hand at an office or place of business in such other state.

In the case of investments not held in trust, when made, created or acquired in the course of repeated transactions of the same kind, conducted from an office of the owner in such other state, and (1) representing obligations of persons residing in such other state or secured by property located therein, or (2) when an officer or agent of the owner at the owner's office in such other state, has authority in the course of the owner's business, to receive or collect the income thereon or the principal, if any, or both when due, or to sell and dispose of the same.

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this

state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof.

Section 5638-1. *Rates of taxation.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to-wit:

Investments, six per centum of income yield for the year 1935 and five per centum of income yield thereafter; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; and moneys, credits and all other taxable intangibles, so listed, three mills on the dollar.

The object of such taxes levied on such property so listed are those declared in section 5414-19 of the General Code to which only the same shall be applied.

Section 5414-19. *Taxes collected for use of general revenue fund.* The taxes levied by section 5414-9 and section 5638-1 of the General Code and collected under the provisions of this chapter shall be for the use of the general revenue fund of the state and shall be paid into the state treasury.

Section 5327. *"Credits", "current accounts" and "prepaid items" defined; what not included.* The term

"credits" as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. "Current accounts" includes items receivable or payable on demand or within one year from the date of inception, however evidenced. "Prepaid items" does not include tangible property. In making up the sum of such current accounts payable there shall not be taken into account an acknowledgment of indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor an acknowledgment for the purpose of diminishing the amount of credits to be listed for taxation.

Section 5625-3. *Authorized to levy taxes.* The taxing authority of each subdivision is hereby authorized to levy taxes annually, subject to the limitation and restrictions of this act, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations and restrictions of this act, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes and certificates of indebtedness of such subdivision and taxing unit including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness. All taxes levied on property shall be extended on the tax duplicate by the county auditor

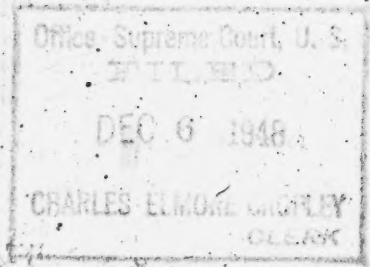


of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules and regulations as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by the fiscal officer thereof shall be deposited in its treasury to the credit of the appropriate fund.

Section 5379. *Corporation may make consolidated return; property, how listed and assessed; inter-company accounts eliminated; joint return.* A corporation which owns or controls at least fifty-one per centum of the common stock of another corporation or corporations may, under uniform regulations to be prescribed by the commission, make a consolidated return or returns for the purpose of this chapter. In such case all the taxable property mentioned in section 5328 of the General Code, belonging to the corporation making the return and to each of its subsidiaries shall be listed and assessed in the name of the separate owners thereof, respectively; but the parent corporation making such return, shall not be required to list any of its investments in the stocks, securities and other obligations of its subsidiaries, and in computing the amount of taxable credits, inter-company accounts shall be eliminated.

A husband and wife living together may under uniform regulations to be prescribed by the commission make a joint return for the purpose of this chapter. In such case investments of either spouse in the obligations of the other shall not be required to be listed therein, and in computing the amount of taxable credits such obligations shall be eliminated.

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1948**

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**No. 448**

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**NATIONAL DISTILLERS PRODUCTS CORPORA-  
TION, New York, New York,**

*Appellant,*

*vs.*

**C. EMORY GLANDER, Tax Commissioner of Ohio**

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**APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO**

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**STATEMENT AS TO JURISDICTION**

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**ISADORE TOPPER,**  
*Counsel for Appellant..*





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SUPREME COURT OF OHIO

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No. 31037

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NATIONAL DISTILLERS PRODUCTS CORPORATION,  
NEW YORK, NEW YORK,

vs.

*Appellant,*

C. EMORY GLANDER, TAX COMMISSIONER, STATE OF OHIO,

*Appellee*

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**STATEMENT IN SUPPORT OF JURISDICTION**

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The appellant, National Distillers Products Corporation, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A

**Statutory Provisions Sustaining Jurisdiction**

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 1257 of Title 28 of the United States Code, which reads as follows:

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.



"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

## B

### **Statutes of Ohio, the Validity of Which Is Involved**

The statutes of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio, the highest Court of the State, as not being violative of or repugnant to the Constitution and laws of the United States, are Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio. The pertinent provisions thereof are:

Section 5325-1 of the General Code of Ohio, which reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-

resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1 of the General Code of Ohio, which reads in part as follows:

"\* \* \* Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code \* \* \* shall be subject to taxation \* \* \*."

Section 5328-2 of the General Code of Ohio, which reads in part as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state. \* \* \*"

The foregoing provisions, particularly Section 5328-2 of the General Code of Ohio, as interpreted and applied in this

case by the Tax Commissioner of Ohio, the Board of Tax Appeals of Ohio, and the Supreme Court of Ohio, are in conflict with Section 8 of Article I of the Constitution of the United States and with the Fourteenth Amendment to the Constitution of the United States.

## C

### **Date of Judgment and Date of Application for Appeal**

The date of final judgment of the Supreme Court of Ohio, which is now sought to be reviewed was October 6, 1948. The opinion and decision of the Supreme Court of Ohio was rendered on August 4, 1948, and the mandate thereupon was stayed by seasonable application for rehearing filed with the Supreme Court of Ohio by appellant on August 16, 1948, which application for rehearing was overruled by said Supreme Court of Ohio on October 6, 1948. The judgment of the Supreme Court of Ohio in the above entitled cause became effective on said date, October 6, 1948. The date for taking the appeal began to run on the date of the denial of said application for rehearing, to-wit, October 6, 1948. *Department of Banking v. Pink*, 317 U. S. 264, 266; 87 L. Ed. 254, 256; *Gypsy Oil Co. v. Escoe*, 275 U. S. 498, 72 L. Ed. 393.

The date on which the application for appeal was presented and the appeal allowed was October 30, 1948.

Under the provisions of Sections 2101 and 2104 of Title 28 of the United States Code, the appellant may bring its appeal within ninety days after the entry of the final judgment rendered by the Supreme Court of the State of Ohio.

## D

### **Nature of Case and Rulings Below**

The appellant is a corporation organized under the laws of the State of Virginia, with its principal office and place



of business in the City of New York, in which State it is qualified to do business as a foreign corporation. It is also qualified to do business as a foreign corporation in the State of Ohio wherein it maintains and operates a distillery at Carthage, Hamilton County, Ohio. The appellant is principally engaged in the business of manufacturing alcohol, whiskey and alcoholic beverages in the States of Ohio, Kentucky, Pennsylvania, Maryland, Illinois, New Jersey and Missouri. It sells its various products in the states where the sale and distribution of alcoholic beverages is not a state monopoly through its regional sales offices located in such states, all orders taken by such regional sales offices being subject to approval and acceptance at the office of the appellant located in New York City. Sales to monopoly states, such as Ohio, are made by and through the office of appellant in New York City.

The appellant filed an annual Ohio personal property tax return for the year 1944, at the time and in the manner prescribed by law, and paid a tax in an amount computed on the basis of said return. Thereafter, on December 5, 1945, the Tax Commissioner of Ohio by preliminary assessment certificate (R. 1) ascribed an Ohio situs to a part of the accounts receivable of the appellant totaling the sum of \$2,996,670.00 and added that amount to the personal property tax return of the appellant. The accounts receivable so added to the return of appellant by the Tax Commissioner of Ohio involved accounts receivable arising from sales negotiated, approved and made outside the State of Ohio by appellant during the year 1943 from products manufactured in and shipped from its plants in Ohio, on instructions from its offices in New York City. The accounts receivable were controlled by and payable to the appellant in New York City, and the proceeds thereof deposited in banks in New York City and used, together with

other funds, by the appellant in the operation of its business throughout the United States. The Tax Commissioner, after ascribing an Ohio situs to said accounts receivable, made and issued an additional assessment certificate against appellant for the tax year 1944 in the sum of \$8,990.01.

After the additional assessment certificate was issued, appellant filed with the Tax Commissioner of Ohio an application for review and correction of the 1944 additional intangible personal property tax assessment made by the Tax Commissioner (R. 2) in which the appellant recited and declared that the determination and assessment made by the Tax Commissioner that such accounts receivable of appellant were allocable to Ohio for the purpose of taxation was contrary to and constituted a violation of Section 8 of Article I of and of the Fourteenth Amendment to the Constitution of the United States (R. 2, 3).

On January 8, 1946, the Tax Commissioner of Ohio denied said application for review and redetermination in an entry in which said Tax Commissioner held that he was without authority to set aside acts of the Legislature of Ohio on constitutional grounds, referring specifically to the contention of appellant made in its application for redetermination and review (R. 4). From this order of the Tax Commissioner of Ohio a notice of appeal was filed by appellant with the Board of Tax Appeals of the State of Ohio on January 16, 1946, in the manner required by law, and in a petition on appeal filed by appellant on said date contended that "the finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of Section 8 of Article I of and the Fourteenth Amendment to the Constitution of the United States, \* \* \*" (R. 8).

The case was heard and submitted to the Board of Tax Appeals upon the transcript of the proceedings before the

Tax Commissioner, a stipulation of facts and on the briefs and oral argument of counsel, and on March 12, 1947, the Board of Tax Appeals denied the appeal of appellant and in its affirmance of the action of the Tax Commissioner declined to consider or pass upon the constitutional questions raised by appellant in its appeal. The opinion and entry of the Board of Tax Appeals is set forth in full in Appendix B hereto appended.\*

Appellant filed an appeal on April 2, 1947, from said decision of the Board of Tax Appeals to the Supreme Court of Ohio and in its assignment of errors filed with said Court contended and asserted in its fifth assignment of error "that the finding, determination, assessment and order of the appellee, approved and confirmed by the Board of Tax Appeals, that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation and taxable in Ohio is contrary to and violates Section 8 of Article I of and the Fourteenth Amendment to the Constitution of the United States, \* \* \*." The case was submitted to the Supreme Court of Ohio on the record, the stipulation of facts, and the briefs and arguments of counsel.

On August 4, 1948, the Supreme Court of Ohio rendered an opinion in which it held that on the facts stated in the stipulation of facts filed in this case, the appellant, as a corporation organized and existing under the laws of the State of Virginia is a legal resident of that State; and as to the appellant, the State of Ohio is "a state other than that in which the owner thereof resides," within the provisions of Sections 5328-2 of the General Code fixing the situs of accounts receivable and of other intangible personal prop-

\* (Clerk's Note.—The opinion and entry are printed as an appendix to the Statement as to Jurisdiction in the case of *Wheeling Steel Corp. v. Glander*, No. 447, October Term, 1948 and is not reprinted here).



erty for the purpose of taxation: The Court further held that in this situation and applying the statutory provisions in question, viz: Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as the same have been construed by the Supreme Court of Ohio, it follows that since the accounts receivable of appellant arose in the conduct of its business in the State of Ohio by the sale of its products from a stock of goods located in the State of Ohio, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by appellant in its business, whether in the State of Ohio or elsewhere, such accounts receivable have a business and taxable situs in the State of Ohio, as found and determined by the Tax Commissioner of Ohio. The Supreme Court of Ohio further held that said Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio are not in conflict with the provisions of Section 8 of Article I of the Constitution of the United States and with the provisions of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Ohio affirmed the decision of the Board of Tax Appeals of the State of Ohio, which sustained the action of the Tax Commissioner of Ohio in assessing the accounts receivable as personal property for tax purposes. See Appendix A hereto appended, Opinion, Supreme Court of Ohio, 150 O. S., 229.\*

## E

### Substantiality of Questions Involved

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established

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\* (Clerk's Note.—The opinion is printed as an appendix to the Statement as to Jurisdiction in the case of *Wheeling Steel Corp. v. Glander*, No. 447, October Term, 1948 and is not reprinted here).

that an appeal will not be dismissed for want of a substantial federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." *Hamilton v. Regents of University of California*, 293 U. S. 245, 258, 79 L. Ed. 343, 350. In this regard it is pointed out that the Board of Tax Appeals of the State of Ohio in its opinion (set forth in full as Appendix B appended hereto) said:

"With respect to a question such as that here presented, to-wit, that as to the taxation of the accounts receivable of a foreign corporation arising in the conduct of its business in this state, the application of the above quoted provisions of Sections 5328-1, 5328-2 and other related Sections of the General Code, as the same have been construed by the Supreme Court, presents, to our mind, a serious question as to the constitutionality of said statutory provisions as so construed under the due process of law clause of the federal Constitution. \* \* \*

"Whatever the answer may be as to the constitutionality of the above quoted provisions of Sections 5328-1, 5328-2 and related sections of the General Code, as the same have been heretofore construed by the Supreme Court of this State, in their application to the facts of this case, it is quite clear that the Board of Tax Appeals as an administrative and quasi judicial board or tribunal has no jurisdiction and authority to consider and determine such constitutional question."

The issue raised by the contention of appellant that the application of the Ohio statutes herein involved, by the Tax Commissioner of Ohio under the decision in this case of the Supreme Court of Ohio constitutes such statutes a burden upon interstate commerce in violation of Section 8 of Article I of the Constitution of the United States presents the question of whether accounts receivable, being the intangible personal property of a corporation domiciled in Virginia and maintaining a commercial domicile in New York may

be subjected to a multiple state tax burden where such intangible personal property is an integral and inseparable part of the interstate commerce in which the owner thereof is engaged. See *Memphis Natural Gas Co. v. Stone*, 92 L. Ed., 1409, 1415; *Central Greyhound Lines v. Mealey*, 92 L. Ed., 1235, 1240; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S., 422, 428, 91 L. Ed. 993, 1001; *Freeman v. Hewit*, 329 U. S. 249, 256, 91 L. Ed. 265, 274; *Adams Manufacturing Co. v. Storen*, 304 U. S. 307, 311, 82 L. Ed. 1365, 1369; *Western Livestock Association v. Bureau of Revenue*, 303 U. S., 250, 255, 82 L. Ed., 823, 828.

A decision by the Supreme Court of the United States on the questions herein involved will remove grave uncertainty in the field of interstate commerce involving sales of goods manufactured in one state and sold in another and transactions frequently involving the intervention of important and essential activities in yet a different state. Any business entity having diversified manufacturing and sales activities is vitally interested in the results of this litigation because of the danger inherent in the decision of the Supreme Court of Ohio that a cumulative multiple burden will be imposed by state taxation upon interstate commerce, not only causing a serious impediment to such commerce but further discriminating against businesses engaged in interstate commerce in a manner tending to favor businesses engaged solely in intrastate commerce.

The issue raised by the contention of appellant that the statutes of the State of Ohio herein questioned violate the due process clause of the Fourteenth Amendment to the Constitution of the United States involves the problem of taxation of intangible personal property, no incident of the ownership of which lies within the territorial jurisdiction of the taxing state. Thus is drawn into question whether a state, by legislative definition of "business situs" of intan-



gible personal property, may bring within its taxing jurisdiction intangible personal property, which, under all commonly and judicially understood concepts of "business situs" has a business situs outside the taxing jurisdiction of the state.

The Supreme Court of Ohio in its decision in this case held that on the facts set forth in the stipulation of facts filed in this case, the appellant was the owner of accounts receivable which arose out of sales made from a stock of goods maintained within the State of Ohio, and that said accounts receivable or the avails thereof were used in business by said appellant whether in Ohio or elsewhere. The Supreme Court of Ohio further held that the taxation of such accounts receivable by the State of Ohio did not involve a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. Appellant, however, contends that in order for accounts receivable or other intangible personal property to be taxed by a state other than the state in which the owner is a resident, without a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, such accounts receivable or other intangible personal property must have acquired a business situs in the state so assessing the tax. Appellant further contends that a business situs is a real and substantial legal concept and cannot validly be created by legislative fiat, and appellant contends and submits that the factual basis upon which the Supreme Court of Ohio found business situs to exist in this case with respect to the accounts receivable taxed by the State of Ohio is insufficient to support such a finding and, therefore, the application of the statutes in question in the manner set forth in the decision of the Supreme Court of Ohio in this case constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United

States. See *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77, 80, 82 L. Ed., 674, 677; *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 211, 80 L. Ed., 1143, 1148; *Concordia Fire Insurance Co. v. Illinois*, 292 U. S. 535, 548, 78 L. Ed., 1411, 1419; *Air Way Electrical Appliance Corp. v. Day*, 266 U. S. 71, 83, 69 L. Ed., 169, 177; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 141, 62 L. Ed., 624, 629.

The issue raised by the above set forth contention of appellant that the application of the statutes herein questioned constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States has never been passed upon by the Supreme Court of the United States, the Court never having been presented with a factual legal situation such as that in the instant case in which business situs of intangibles is defined by the legislature of a state to be something other than the well defined judicial concept of business situs which can and does give rise to taxability of intangible personal property.

The issue raised by the contention of appellant that the application of the statutes of the State of Ohio herein questioned in accordance with the decision of the Supreme Court of Ohio constitutes such statutes a violation of the equal protection clause of the Constitution of the United States involves the question of whether a foreign corporation may be taxed upon its intangible personal property in factual circumstances under which a domestic corporation would escape the taxation on precisely the same type of intangible personal property.

The decision of the Supreme Court of Ohio relative to the taxation of the accounts receivable of appellant in question in the instant case clearly approves the taxation of intangible personal property of appellant, a foreign corporation, whereas, if appellant were a domestic corporation,

the same intangible personal property would be exempt from taxation under the law of Ohio, as announced by the Supreme Court of Ohio in the case of *Ransom and Randolph v. Evatt*, 142 U. S. 398. Such a result clearly involves discrimination against a foreign corporation and constitutes a denial to such foreign corporation to the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States. See *Concordia Fire Insurance Co. v. Illinois*, 292 U. S. 535, 548, 78 L. Ed., 1411, 1419.

WHEREFORE, the appellant, National Distillers Products Corporation, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 1257 of Title 28 of the United States Code.

Respectfully submitted,

ISADORE TOPPER, .

*Attorney for National Distillers  
Products Corporation, Appellant.*



## APPENDIX "A"

## IN THE SUPREME COURT OF OHIO

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION, New York,  
New York, *Appellant*,

*vs.*

C. EMORY GLANDER, Tax Commissioner, State of Ohio,  
*Appellee*.

**Certificate as to Federal Question Involved**

It is certified that the above entitled cause came on for hearing in the Supreme Court of Ohio upon the record of proceedings, the stipulation of facts, and the briefs and arguments of counsel, and that at each stage of the proceedings in this case substantial federal questions were raised by and argued and urged by appellant, to-wit: (1) That Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as said sections have been applied by the Tax Commissioner of Ohio in this case, are contrary to and in violation of Section 8 of Article I of the Constitution of the United State; (2) That said Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as applied in this case by the Tax Commissioner of Ohio, are contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Such questions were raised by appellant in its application for review and redetermination of the assessment of the Tax Commissioner (R. 2, 3), in its petition on appeal filed with the Board of Tax Appeals of Ohio on January 16, 1946 (R. 8) and in its assignments of error and brief filed with the Supreme Court of Ohio.

With respect to such substantial federal questions, the Tax Commissioner of Ohio found and determined that he did not have authority to set aside acts of the legislature on constitutional grounds and the Board of Tax Appeals found that it was without authority to consider and deter-

mine questions of constitutionality of statutes of the State of Ohio. Further, with respect to substantial federal constitutional questions, the Supreme Court of Ohio held that said Sections 5325-1, 5328-1 and 5328-2 as applied by the Tax Commissioner of the State of Ohio in this case were not contrary to nor in violation of Section 8 of Article I of the Constitution of the United States nor contrary to nor in violation of the Fourteenth Amendment to the Constitution of the United States.

Witness the Honorable Supreme Court of Ohio this 30 day of October, 1948.

SUPREME COURT OF OHIO,  
By CARL V. WEYGANDT,  
*Chief Justice of the Supreme  
Court of Ohio.*

(9903)

Approved by

CLERK OF THE SUPREME COURT, U. S.

# Supreme Court of the United States

October Term, 1948

No. 448

NATIONAL DISTILLERS' PRODUCTS  
CORPORATION, New York, New York,

*Appellant,*

C. EMORY GLANDER,  
Tax Commissioner of Ohio,

*Appellee.*

## BRIEF FOR APPELLANT

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Point II. Furthermore, and irrespective of the vice of being a direct tax on interstate commerce, the tax under appeal is on an intangible having no situs in Ohio.

Hence, its enforcement constitutes the taxing of property without "due process of law." Ohio has no jurisdiction over the receivables it has taxed

A. There is no domiciliary situs in Ohio

B. There is no business situs in Ohio

C. Hence, Ohio has no jurisdiction to levy an *ad valorem* property tax upon these accounts receivable

D. Since the interstate contracts and the indebtedness contracted therein, and their avails, are all integrated with the appellant's business in New York, Ohio has no jurisdiction over them on the theory of benefit or protection

E. The fact that the appellant's executives in New York directed that shipment be made from the appellant's Ohio plant cannot give an Ohio situs to the antecedent contract and to the antecedent obligation of the orderer embodied therein

Point III. Furthermore, the tax under appeal, and the Ohio statute as construed and applied by the Ohio Supreme Court, are a violation of the Fourteenth Amendment in that they constitute a denial of "the equal protection of the laws"

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# Supreme Court of the United States

October Term, 1948

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No. 448

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NATIONAL DISTILLERS PRODUCTS CORPORATION,  
New York, New York,

*Appellant,*

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio,

*Appellee.*

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## BRIEF FOR APPELLANT

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### Statement as to Jurisdiction and the Decisions Below

This appeal, under Section 1257(2) of Title 28, United States Code, is from a final judgment of the Supreme Court of Ohio affirming a decision of the Board of Tax Appeals in the Department of Taxation of Ohio.

This Court has noted "probable jurisdiction" (R. 67).

By the determination affirmed, the Tax Commissioner of Ohio levied an *ad valorem* property tax on the face amount of certain accounts receivable of the appellant, a Virginia corporation with its principal place of business and executive offices in New York City, and with one of its manufacturing plants in Ohio.

The Supreme Court of Ohio has certified that it considered and adversely determined the appellant's contentions that Sections 5325-1, 5328-1 and 5328-2 of the Gen.

eral Code of Ohio, as applied in this case, were contrary to the "commerce" clause in the United States Constitution and contrary to the "due process" and "equal protection" clauses in the Fourteenth Amendment (R. 8, 32-3).

The decision of the Supreme Court of Ohio is reported in 150 O. S. 229. The denial of the application for rehearing is noted unofficially on page 340 of the October 11, 1948, issue of the Ohio Bar. The decision of the Board of Tax Appeals of Ohio is unofficially reported in 72 N.E. (2d) 592.

The facts have been stipulated (R. 51-8).

### **The Ohio Statutes Involved**

These are printed in full in the Appendix (p. 46, *post*). The pertinent portions are quoted later in the Statement of the Case (p. 8, *post*).

### **Questions of Law Involved**

1. Do Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio, as applied in the instant case, violate the "commerce" clause (Section 8, Article I) of the United States Constitution? (See Point I, p. 11, *post*.)

2. Do these Sections, as so applied, violate the "due process" clause of the Fourteenth Amendment? (See Point II, p. 31, *post*.)

3. Do these Sections, as so applied, violate the "equal protection" clause of the Fourteenth Amendment? (See Point III, p. 41, *post*.)

### **Assignments of Error**

The Assignments of Error, presenting these three questions, are at pages 3 and 4 of the Record.



## A Concise Statement of the Case

### The Gist of the Case

1. The Ohio Tax Commissioner has levied a direct *ad valorem* property tax on a segment (hereinafter described) of the appellant's gross interstate business, to wit: on the face amount of certain of its accounts receivable embodied in contracts made by the appellant at its executive offices in New York for the sale and delivery of goods in interstate commerce. The avails were payable and were paid to appellant in New York for inclusion in its general fund there maintained and for use in its general business there conducted, including its interstate business.

These interstate contracts were made by the appellant at its New York office in acceptance of orders from "open" and "monopoly" states and for delivery in such states (R. 54-5). The orders were not for beverages specified as located in any particular warehouse or manufactured in any particular distillery, but were for beverages designated by brand name or other general description. Such orders could properly be filled by delivery of the designated quantity shipped from any source or sources as directed by the appellant's executives in New York; and they were so filled (R. 52-7).

2. The Ohio Tax Commissioner has levied an *ad valorem* property tax on the face amount of the appellant's interstate business in terms of accounts receivable, represented by the shipments which its New York executives directed to be made from its Carthage distillery in Ohio (R. 56-7).

3. The Ohio Board of Tax Appeals noted, in its opinion, that formerly it had interpreted the Ohio statutes as to taxes on accounts receivable payable to non-residents as requiring that the taxable receivables not only "arose

in the conduct" of the Ohio business of the non-resident taxpayer, but also were "so used as to become an integral part of the business carried on in" Ohio; "and that it was not sufficient that such accounts receivable and other intangible property be used in business generally by the taxpayer" (R. 63).

The Board of Tax Appeals further noted, however, that its former view to this effect had been overruled by the Ohio Supreme Court in *Ransom & Randolph Co. v. Evatt, Tax Commissioner*, 142 O. S. 398, 404, 408 (1944); and that, under this overriding determination, accounts receivable as defined in the Ohio statutes, owned by a non-resident of Ohio, were nevertheless taxable in Ohio, whether or not their avails were applied or intended to be applied in Ohio (R. 63).

4. The Ohio Board of Tax Appeals has further noted in this very case that this later determination by the Ohio Supreme Court "presents, to our mind, *a serious question as to the constitutionality of said statutory provisions as so construed under the Due Process of Law clause of the Federal Constitution*" (R. 64). (Italics ours.)

5. The decision by the Ohio Supreme Court exposes the appellant to the hazard of *multiple taxation on the same accounts receivable*, to wit:

(a) Taxation by New York ("the commercial domicile" of the appellant). (*Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 211-5.)

(b) Taxation by Virginia ("the legal domicile" of the appellant). (*Greenough v. Tax Assessors*, 331 U. S. 486, 492-3; *Newark Fire Ins. Co. v. State Board*, 307 U. S. 313, 318; *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325.)

(c) Taxation by any other state which chooses to levy a tax on accounts receivable resulting from orders calling for delivery for consumption in such other

state. (*McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 58; *General Trading Co. v. Tax Comm'n*, 322 U. S. 335.)

- (d) Taxation by any other state which chooses to levy a tax on accounts receivable resulting from sales by an established agent of the appellant located in such other state, or resulting from sales of goods delivered from a stock maintained in such other state.

By the same token, the decision by the Ohio Supreme Court exposes the appellant's interstate commerce to the risk of a *multiple tax burden*. It has one or more similar plants in Maryland, Pennsylvania, Missouri, Kentucky, Illinois and New Jersey (R. 52).

6. Under the Ohio tax statutes the appellant is subject to a tax on its right to possess and use its real property and its tangible personal property in Ohio, including whiskey in bulk and in cases (Ohio General Code, §5625-3). (See p. 15, *post*.)

It is also subject, for its privilege of engaging in manufacturing in Ohio, to a franchise tax based on a formula which includes (among other factors) the value of all its property used in business in Ohio and of all its goods manufactured in Ohio irrespective of where sold (Ohio General Code, §§5495, 5498, 5499). (See p. 15, *post*.)

### **The Appellant's Interstate Business**

The appellant is a Virginia corporation. It holds, in that state, its stockholders' annual meetings (R. 51):

It is also licensed to do business, as a foreign corporation, in the State of New York. Since 1924 it has maintained its principal business and executive office in the City of New York, where its directors' meetings are held; its dividends are declared and paid; its stock registrars and transfer agents are located; its executives have their



offices; its general fund is maintained; its contracts are made; and all its business activities and policies are determined, directed and controlled (R. 51).

All the appellant's accounts payable are paid by checks prepared and signed in its New York office, and drawn on funds deposited in New York City banks, except that local payrolls for plant employees (including those employed at Carthage, Ohio) and local excise taxes are paid from funds on deposit in local banks, which funds are in turn supplied to such banks by checks drawn in appellant's New York office on its general fund in New York City banks (R. 51-2).

All the appellant's receivables are posted in its New York City books and are payable at its New York City offices; and the avails are deposited in its New York City bank accounts. Such avails are mingled with the appellant's general fund in New York and are used in its business throughout the United States (R. 52). All extensions of credit must be authorized by New York (R. 55).

The appellant's principal business is the manufacture and sale of alcohol, whiskey and other alcoholic beverages. It owns and operates distilling or rectifying plants and plant warehouses in many states. Shipments of products are made from such plants or plant warehouses as its New York office may direct for filling orders received (R. 55, 56). Shipments from all plants are made for the account of and are billed by the appellant (R. 52). Plants may not ship except upon orders from New York (R. 55).

The conditions of sale, in the case of the so-called "open" states, require that all orders shall be forwarded to the regional sales office for transmittal to New York and shall be subject to approval and acceptance by its New York office. The appellant maintains regional sales offices in various cities in the "open" states. It does not maintain a regional sales office in Ohio, which is a "monopoly" state (R. 54-5). Orders from "monopoly" states

go directly to the appellant's New York office, and are there subject to acceptance or rejection (R. 55).

The forms and "Conditions of Sale" used by the appellant in the transaction of all its business are reproduced or described in the Stipulation of Facts (R. 53-6).

All invoices are headed (R. 56):

"National Distillers Products Corporation  
120 Broadway  
New York, New York".

A note on the customer's copy of the invoice reads (R. 56):

"Make all checks payable to  
National Distillers Products Corporation  
120 Broadway  
New York, New York".

#### **The Ohio Statutes for the Taxation of Accounts Receivable of Non-Residents**

These statutes are printed in full in the Appendix hereto (p. 46, *post*). The relevant portions are as follows:

Section 5325-1 of the General Code of Ohio is entitled: "Application of term 'used in business'; definition of word 'business'." The entire section reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and pre-

paid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1 of the General Code of Ohio is entitled: "Property to be entered on classified tax list and duplicate; exemption". It provides in part as follows:

"\* \* \* Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation \* \* \*."

Section 5328-2 of the General Code of Ohio is entitled: "Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid". It provides in part as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by



an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The nature of the taxation under these statutes has been authoritatively declared by the Supreme Court of Ohio in *Bennett v. Evatt*, 145 O. S. 587, as follows (p. 593):

"Concededly a tax based on the income yield of intangible property is not an income tax, an excise tax or a franchise tax. It necessarily is a tax upon property."

### **The Action of the Ohio Tax Authorities**

1. During 1943 the appellant kept at its manufacturing plant at Carthage, Ohio, whiskey in barrels for the purpose of aging (R. 57).

Ninety percent of the whiskey shipped from the Carthage plant in 1943 was blended, rectified or bottled for

shipment upon receipt of shipping directions from appellant's New York office, and went to customers and to appellant's warehouses in other states as directed by its New York Office. The remaining ten percent of whiskey shipped to customers and warehouses in other states had previously, on directions from New York, been shipped to the Carthage plant from other plants of the appellant outside of Ohio for the purpose of transshipment (R. 56-7).

No whiskey was rectified, blended or bottled in Ohio for inventory for shipping against future orders (R. 57).

2. For the tax year 1944 the appellant filed with the Ohio Tax Commissioner its annual report for personal property taxes. It did not allocate any of its accounts receivable to the State of Ohio.

Thereafter the Ohio Tax Commissioner surcharged such annual report "by ascribing an Ohio situs to accounts receivable of \$2,996,670, in determining and assessing the (appellant's) intangible personal property tax" (R. 57).

This sum, according to the stipulation of facts herein, was the total of the accounts receivable in the cases where the appellant's products had been manufactured in and shipped from its Ohio plant, in accordance with directions from its New York office, "to customers throughout the United States" in the course of its aforesaid interstate business during 1943 (R. 57).

This surcharge appears on page 50-C of the Record and reads as follows:

"2,996,670 = \$8990.01. Assessment under decision of the Supreme Ct. of Ohio in the case of R. & B. Co. v. Evans, 142 O. S. 398."

Neither Virginia nor New York has as yet any personal property taxes on accounts receivable (R. 58).

## POINT I

The tax, as applied below to this appellant, is a direct tax on its interstate business.

Moreover, the tax, as so applied, directly burdens interstate commerce, and subjects it to the hazard of multiple taxation.

Hence, for all these reasons, the determinations under appeal have invaded the area of trade which the Commerce Clause keeps free from interference by the States.

## A

The Commerce Clause as a limitation on the taxing power of the states.

1. In the first place, the Commerce Clause is not merely authority for enactment by Congress of laws for the protection and promotion of commerce among the states. It is also, by its own force and without implementing legislation by Congress, a limitation upon the power of the states. It has "created an area of trade free from interference by the states", *Freeman v. Hewit*, 329 U. S. 249, 252. See also *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769; *Morgan v. Virginia*, 328 U. S. 373, 380, 387; and other cases cited at pages 18 to 28, *post*.

Under the Commerce Clause, a state is automatically precluded from taxing "the very process of interstate commerce", or from throwing on interstate commerce the burden involved in a direct tax. "The power to tax is a dominant power over commerce" and cannot be exercised by the states (*Freeman v. Hewit*, *supra*, p. 253).

Were this otherwise, interstate commerce could be restricted and even paralysed by "barriers which it was the object of the commerce clause to remove". (*Western Live Stock v. Bureau*, 303 U. S. 250, 256.)



2. In the second place, the Commerce Clause protects the economy of the nation from being disintegrated by duplicating taxes imposed by several or more states upon the same interstate business.

As Mr. Justice Rutledge has truly said in his "*A Declaration of Legal Faith*," 72, 73:

"From the disunited states of 1786, which interstate trade barriers had created, has grown the United States of 1946. No small part of that growth has been due to the effects of the commerce clause and its administration. Perhaps no other constitutional provision has played a greater part \* \* \*. A balkanized America today would be vulnerable to attack from without and would be unequal to maintaining our people within."

### B.

#### **The direct tax on the appellant's interstate business**

1. In the present case, Ohio has imposed such a direct tax on the very process and proceeds of interstate commerce. It has sought to tax directly the face amount of choses in action which from origin to end are part of, represent and embody interstate commerce.

As said by this Court in *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 212-3: "the tax is a property tax on the accounts receivable, as separate items of property"; and these separate items of property "are not to be regarded as parts of the manufacturing plants where the goods sold are produced", "but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale".

These statements by this Court are here particularly applicable because the accounts receivable here involved are themselves obligations and proceeds embodied in interstate sales contracts not made in Ohio at all—contracts

which are a part of and constitute interstate commerce and create interstate indebtedness neither covenanted nor accruing nor localized nor payable in Ohio.

In their terms, these contracts neither called for any action by the appellant in Ohio nor specified that any goods in Ohio should be the subject of delivery thereunder. That goods were delivered out of the appellant's plant in Carthage, Ohio, was not because of any localizing specification in the contracts themselves but solely because of the circumstance that the appellant's executives at its office in New York directed shipment therefrom (R. 56).

Furthermore, New York, not Ohio, was the seller state; and various of the states were the buyer states. The contract, in which the receivable was an embodied obligation, had no situs whatever in Ohio. The debt which, by that contract, the buyer undertook, was not undertaken in Ohio, and it was not payable in Ohio. It had its sole embodiment in, and owed its incurring solely to, an interstate contract constituted of an order and acceptance in states other than Ohio.

Ohio contributed nothing to the making of the contract or to the inclusion therein of any of its terms. It was not an Ohio contract. The appellant was under no obligation, legal or moral, to pay tribute to Ohio for the making of it.

Moreover, a receivable of the group here involved was not an intrastate incident which was distinct from the interstate contract and from the interstate commerce of which it was a term and part. It could not possibly be separated therefrom and be given independent existence and localization in Ohio.

No suit could have been brought thereon by the appellant in the Ohio courts unless, as in the case of any transitory chose in action, the defaulting debtor could be found within that jurisdiction,—a contingency equally available to the appellant in any state where the defaulting debtor could be found.

2. Ohio's direct tax on the face amount of these accounts receivable is indistinguishable in business actualities from a direct tax on the *gross proceeds* which they obligate, and hence on the interstate commerce itself.

Constitutional provisions protective of the realities of interstate commerce call for practical consideration of commercial operation and fiscal relationship, and not for the techniques of mere verbalisms or tags of nomenclature. Direct state taxes on the gross receipts or proceeds which are the very grist of the mills of interstate commerce violate the Commerce Clause and jeopardize the cohesion of the nation. (*Nippert v. Richmond*, 327 U. S. 416, 431; *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444.)

3. Even if (contrary to the fact and the law) Ohio could be said to have contributed to or had some part in the making of the contract in which the receivable was an embodied obligation, neither the decisions below nor the Ohio statutes provide for any apportionment as between Ohio's (hypothetical) part and the part played by the state whence the order came and the part played by New York where the order was accepted. There was not even an apportionment as between the parts which the several states played or might play in the performance of the contract or in any required enforcement. There was not even an apportionment based on the extent, if any, to which the avails could actually or theoretically be said to be later used in Ohio by reason of their total inclusion and dissolution in the appellant's general fund in New York (R. 52).

Ohio has simply and directly taxed the face amount of the whole receivable,—not any use of the avails in Ohio. In practical effect, Ohio has taxed the gross amount of what came out of and through interstate commerce into the appellant's general bank account in New York from an indebtedness contracted in New York rather than Ohio and covenanted for by a bargain made as between the orderer in such state and the acceptor in New York.



Ohio has already imposed its tax on all the appellant's real and personal property therein (R. 56), and on the appellant's franchise to do business and manufacture therein (this page, *post*). To the making of the interstate contracts which embodied these accounts receivable, Ohio has contributed no benefit or protection whatever,—certainly none “adequate to support a tax exaction” of the present character, and not fully recompensed by other tax exactions. (*Greenough v. Tax Assessors*, 331 U. S. 486, 491; *McCarroll vs. Dixie Lines*, 309 U. S. 176.)

### C

**Appellant is subject to Ohio's taxes on its real property, on its tangible personal property, and on its franchise to manufacture, in Ohio.**

The Stipulation of Facts states (R. 56):

“The corporation paid real estate taxes on its plant and plant warehouses in Ohio and personal property taxes on its machinery, equipment and other tangible personal property in Ohio, including its products (whether in bulk or in cases) and which products subsequently were shipped from its Ohio plant warehouses to its customers in other states on orders solicited and accepted by its agents and employees in such other states.”

Ohio's provisions for taxing real and personal property in that state are in Chapter 12 of the Ohio General Code; and particularly in §5625-3. Special provisions for the taxing of machinery, manufactured articles or materials and merchandise held for sale, are in §§5382, 5385, 5386 and 5388. Tangible property is defined in §5325.

§§5385, 5386, 5387 and 5388 provide for the valuation for tax purposes “of all articles purchased, received or otherwise held for the purpose of being used, in whole or

in part, in manufacturing, combining, rectifying or refining;" and "of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto." The same sections also provide for the listing for tax purposes "of all personal property used in business and belonging to a manufacturer".

The franchise tax on the right of a foreign corporation to do business and manufacture in Ohio is set forth in §§5495, 5498 and 5499 of the Ohio General Code. The tax follows a formula which includes (among other factors) the value of all its property used in business in Ohio and the value of all its goods manufactured in Ohio irrespective of where sold.

## D

### The application by the Ohio Supreme Court of the tax provisions here involved

1. As already stated (pp. 3, 4, *supra*), the Ohio Board of Tax Appeals had at one time held (R. 63):

"Before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicile of the taxpayer, it must appear that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other state, *but were therein so used as to become an integral part of the business carried on in such other state.*" (Italics ours.)

Subsequently the Supreme Court of Ohio, in *The Ransom & Randolph Co. v. Evatt*, 142 O. S. 398, eliminated the limitation italicized in the above quotation, and held that "the business situs" of a taxable receivable did not depend upon whether "the avails thereof are being ap-

plied or are intended to be applied in the conduct of the taxpayer's business, whether in this State or elsewhere." (R. 63).

As a result, the Ohio Board of Tax Appeals in this very case has said that that decision by the Ohio Supreme Court "presents, to our mind, a serious question as to the constitutionality of such statutory provisions as so construed under the Due Process of Law Clause of the Federal Constitution" (R. 64).

2. In this connection, it is pertinent to call to the attention of this Court the remarks of Hon. Aubrey A. Wendt, then assistant attorney general of Ohio in charge of tax matters, in a paper on "Tax Situs of Intangibles" read at the National Tax Administrators Association convention in Toronto, Ontario, subsequent to the decision of the Ohio Board of Tax Appeals but prior to the decision of the Supreme Court of Ohio in the instant case.

These remarks are reprinted in the Prentice-Hall State and Local Tax Service (Ohio) at paragraph 34,264. Pertinent excerpts therefrom are as follows:

"In Ohio our legislature has undertaken to set forth the conditions necessary for the establishment of a business situs. The provisions apply to both domestic and foreign corporations. It is further provided that if the other state concerned has reciprocal provisions, there shall be no double taxation of such property. Two factors are made essential. First, that the intangibles arise out of business, and, second, that they shall be used in business. Without going into our Ohio statute in detail, it is sufficient to say that our taxing authorities originally interpreted the statute as meaning that Ohio would tax all intangibles of domestic corporations except such portions thereof as were both used in business and arose in business in a foreign state, and, conversely, that we would tax no intangibles of foreign corporations unless they were both used in business



and arose in business in Ohio. A few years ago our Supreme Court upset this interpretation, holding that the intangibles of a domestic corporation might be used in business anywhere; the sole test, the court said, is where the credits arose. In reversing his procedure, the Tax Commissioner was thereupon obliged to allocate to Ohio all intangibles of foreign corporations which were used in business anywhere if such intangibles arose in Ohio. As I stated at the outset, this interpretation has been challenged in three cases which were submitted to our Supreme Court nearly a year ago, since which time we have been anxiously awaiting decisions. In these three cases, it was contended that the Commissioner's present practice, which follows the rule previously announced by our Supreme Court with respect to domestic corporations, is either contrary to the statutes, or that the statutes are unconstitutional in that they violate the Fourteenth Amendment by taking property without due process. We are inclined to think that our Supreme Court must either be frank enough to admit its error and overrule the former case, make a strained attempt to distinguish the former case, or else hold the statute to be unconstitutional. *If the court should decide to follow the rule it formerly announced in respect of domestic corporations, reversal by the United States Supreme Court seems almost inevitable. To hold otherwise would be to permit a state by legislative fiat to tax property not within its territorial jurisdiction.* (Italics ours.)

## E

### Controlling Decisions by this Court.

- (1) A controlling authority, *a fortiori*, is *Freeman v. Hewit*, 329 U. S. 249, decided December 16, 1946, which dealt with an Indiana tax upon "the receipt of the entire gross income" of Indiana residents and domiciliaries (p. 250).

There a trustee (domiciled in Indiana) of an estate created by the will of an Indiana resident instructed his Indiana broker to arrange for the sale at stated prices of specified securities held by him in Indiana. They were offered for sale on the New York Stock Exchange through the Indiana broker's New York correspondents. When a purchaser was found, the trustee delivered the securities in Indiana to his Indiana broker, who mailed them to New York. The New York brokers made delivery, received the purchase price, and remitted the proceeds (less expense and commission) to the Indiana broker, who delivered these proceeds to the trustee in Indiana.

Since the "securities" involved were in law but evidences of choses in action, the sale was, as this Court recognized (p. 258), "an interstate sale of intangibles".

On these facts this Court reversed the Supreme Court of Indiana which had "sustained the tax on the ground that the *situs* of the securities was in Indiana" (p. 251). This Court held (to quote two headnotes):

"1. The Indiana Gross Income Tax Act of 1933 cannot constitutionally be applied to the gross receipts from these sales, since it would constitute a direct burden on interstate commerce in violation of the Commerce Clause."

"3. The Commerce Clause protects interstate sales of intangibles as well as interstate sales of tangibles."

This decision is, we submit, a controlling authority, *a fortiori*, because there the owner of the securities was a resident of the taxing state and physically possessed in that state the very securities which he offered for sale, and which he sent to New York in fulfillment of the contract for their sale. The whole proceeds (less expenses and commission) came back physically to the owner in Indiana.

None of these elements of fact is present in the instant case. Notwithstanding their presence in the *Freeman* case, this Court there said (p. 255):

"This case, like *Adams Mfg. Co. v. Storen, supra*, involves a tax imposed by the State of the seller on the proceeds of interstate sales. To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale."

Again (p. 256):

"These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause."

And again (p. 257):

"The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since *Fargo v. Michigan*, 121 U. S. 230, and *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326."

Mr. Justice Rutledge in his concurring opinion said (p. 283):

"I think the result now reached is justified, as necessary to prevent the cumulative and therefore discriminatory tax burden which would rest on or seriously threaten interstate commerce if more than one state is allowed to impose the tax, as does Indiana, upon the gross receipts from the sale without appor-



tionment or credit for taxes validly imposed elsewhere. This result would follow in view of the *Berwind White* decision and others like it, if not only the state of the market but also the forwarding state could tax the sale 'to the fullest extent' upon the gross receipts. For this reason I concur in the result."

So, likewise, in the instant case. By creating a direct, *ad valorem* tax on the face amount of choses in action embodied in and created by interstate sales contracts not made in Ohio, Ohio has attempted to tax the very process and proceeds of interstate commerce, and has exposed that commerce and the appellant to the hazard of restrictive and multiple tax burdens.

The tax here involved is upon accounts receivable valued in terms of the gross proceeds which they represent. It is equivalent in substance and practical effect to a direct tax on the gross proceeds or receipts themselves and hence on the interstate commerce itself. In *Nippert*, *Richmond*, 327 U. S. 416, this Court said (pp. 424, 431):

"It is old doctrine, notwithstanding many early deviations, that the practical operation of the tax, actual or potential, rather than its descriptive label or formal character is determinative. \* \* \*

"Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern."

2. In *Joseph v. Carter & Weekes Co.*, 330 U. S. 422, decided March 10, 1947, this Court had before it a New York City percentage tax "for the privilege of carrying on" business therein, measurable by "all receipts" allocable to such business. This Court held (to quote the headnotes):

"1. New York City levied an excise tax on the gross receipts of a stevedoring corporation engaged wholly within the territorial limits of the City in loading and unloading vessels moving in interstate and foreign commerce. *Held*: Such a tax is invalid, since

it would burden interstate and foreign commerce in violation of the Commerce Clause of the Constitution.

2. Loading and unloading are essential parts of transportation itself. Therefore, stevedoring is essentially a part of interstate and foreign commerce and cannot be separated therefrom for purposes of local taxation."

Obviously, the proceeds of interstate commerce—the obligation to pay for the interstate sale—is far more "inseparable" from such commerce than the mechanical, objective and localized act of stevedoring.

In the course of its decision, this Court cited *Freeman v. Hewit*, *supra*, and said (p. 429):

"A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as grounds for their invalidation. *Western Live Stock v. Bureau*, 303 U. S. 250, 255. . . . The actual effect on the cost of carrying on the commerce does not differ from that imposed by any other tax exaction—*ad valorem*, net income or excise. Cf. *Western Live Stock v. Bureau*, *supra*, 254."

Again (p. 433):

"We reaffirm the rule of *Puget Sound Stevedoring Company*. 'What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman v. Hewit*, *supra*, p. 256. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences."

3. In *Nippert v. City of Richmond*, 327 U. S. 416, decided February 25, 1946, a municipal ordinance of Rich-

mond imposed upon persons "engaged in business as solicitors" an annual license tax of "\$50 and one-half of one percentum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of \$1,000". Under that ordinance the appellant was convicted and fined. This Court held that the ordinance, as so applied, violated the Commerce Clause; and said (p. 434):

"Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against."

It is significant that the prevailing opinion in the *Nipert* case cited (p. 428) *Adams Mfg. Co. v. Storen* (p. 25, *post*); and that, in his dissenting opinion, Mr. Justice Douglas said (p. 435):

"The Court has not shared the doubts which some of us have had concerning the propriety of the judiciary acting to nullify state legislation on the ground that it burdens interstate commerce. See *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 784, 795, dissenting opinions. But the policy of the Court is firmly established to the contrary."

4. In *McLeod v. Dillworth Co.*, 322 U. S. 327, decided May 15, 1944, a Tennessee corporation, which had no sales office in Arkansas, made contracts in Tennessee for sale and delivery by common carrier in Arkansas. Some orders were solicited and obtained in Arkansas by traveling salesmen domiciled in Tennessee. All orders were taken subject to acceptance by the corporation in Tennessee. No collections were made in Arkansas. The Supreme Court of Arkansas construed the Arkansas tax statute, which imposed a percentage tax upon "the gross receipts" from these sales in Arkansas, as a sales tax and not a use tax; and held that, as so applied, it violated the Commerce



Clause of the Federal Constitution. This determination was upheld by this Court which said (p. 330):

"A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. *The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.*" (Italics ours.)

5. In *Gwin, etc., Inc. v. Henneford*, 305 U. S. 434, decided January 3, 1939, this Court had before it a percentage tax imposed by the State of Washington upon "the act or privilege of engaging in business activities", and measured by the "gross income of the business."

The appellant was engaged in the business of marketing fruit shipped by it from Washington and Oregon to the places of sale in various other states and in foreign countries. The appellant was a Washington corporation having therein its main office at which it made the contracts for the shipments to its out-of-state purchasers. The fruit so shipped was grown partly in Washington and partly in Oregon. The avails of the sale were remitted to the appellant at its home office in Washington. Occasional sales were made to purchasers in Washington.

The Supreme Court of Washington held that the appellant's business was sufficiently "local" (p. 437); but this Court held the tax invalid as in violation of the Commerce Clause of the Federal Constitution. This Court said (p. 439):

"If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. *Adams Manufacturing Co. v. Storen*, *supra*, 310, 311; cf. *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 225, 227; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *Fisher's Blend Station v. State Tax Commission*, 297 U. S. 650; see *Western Live Stock v. Bureau of Revenue*, *supra*, 260. Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

6. In *Adams Mfg. Co. v. Storen*, 304 U. S. 307, decided May 16, 1938, this Court had before it the Indiana Gross Income Tax Act which imposed upon Indiana corporations a percentage tax upon, "*inter alia*, gross receipts derived from trades, businesses, or commerce" (p. 308). The appellant, an Indiana corporation, manufactured road machinery. It maintained its home office, principal place of business and its factory in Indiana. It sold eighty percent of its products to customers in other states and foreign countries upon orders taken subject to approval at the home office. Shipments were made from the factory in Indiana and payments were remitted to the home office in Indiana.

This Court reversed the Supreme Court of Indiana, and held that the tax could not constitutionally be applied to the gross receipts from the appellant's sales in interstate commerce, since such application contravened the Commerce Clause of the Federal Constitution.

This Court said (p. 311):

"We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other States and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent. on every dollar received from these sales.

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon interstate commerce prohibited by Article I, §8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

7. In *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, this Court was concerned with an excise tax imposed by Massachusetts on the appellant Connecticut corporation, whose general business was manufacturing and selling silk fabrics. It maintained a local office in Massachusetts, with a stock of samples and a force of office and traveling salesmen, merely to obtain orders locally and in other states, subject to approval by its home office in Connecticut, for its goods to be shipped directly to the



customers from Connecticut. This Court held that this business was part of the appellant's interstate commerce and not subject to local excise taxation, saying (pp. 153-4):

"The maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation. \* \* \* We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause."

8. In *McCarroll v. Dixie Lines*, 309 U. S. 176. (decided February 12, 1940) this Court held that a state tax allocated to highway purposes and imposed on each gallon of gasoline, above twenty, brought into the state by any motor vehicle for use as fuel in the operation of such vehicle through the state, was in violation of the Commerce Clause, and could not be validated as compensation for the privilege of using the state highways.

9. In *Western Live Stock v. Bureau*, 303 U. S. 250, decided February 28, 1938, this Court, in referring to state taxes violative of the Commerce Clause, said (p. 255):

"The vice characteristic of those (state taxes) which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (citing cases) or added to (citing cases) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it could bear cumulative burdens not imposed on local commerce."

10. To the same effect are:

*Cooney v. Mountain States Tel. Co.*, 294 U. S. 384, 392-3;

*Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 189, 216-8;

*Airway Corp. v. Day*, 266 U. S. 71, 81;

*Kehrer v. Stewart*, 197 U. S. 60, 65;

*Caldwell v. North Carolina*, 187 U. S. 622, 627;

*McCall v. California*, 136 U. S. 104, 109.

11. We conclude this citation of cases by quoting as follows from *Crutcher v. Kentucky*, 141 U. S. 47, 58:

“As a summation of the whole matter it was aptly said by the present Chief Justice in *Lyng v. Michigan*, 135 U. S. 161, 166: “We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress.”

## F

### Conclusion as to the Commerce Clause

(1) It is not enough, in order to uphold the state's levy, to ferret out with a divining rod any conceptual “local incident” to which to attach a tax, particularly where the state has already attached recompensing taxes to any local incident which might be imaginable.

As said by Mr. Justice Reed in *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 87:

“But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation”.

And as said by this Court in *Nippert v. Richmond*, 327 U. S. 416, 423 (per Mr. Justice Rutledge):

“The situation is difficult to think of in which some incident of an interstate transaction taking

place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax".

In the latter case, this Court held (p. 424) that the validity of the state tax upon the so-called "local incident",

"depends upon other considerations of constitutional policy having reference to the substantial effects, *actual or potential*, of the particular tax in suppressing or burdening unduly the commerce." (Italics ours.)

(2) In the present instance, the tax involved is not on any local incident at all. It is on the very process and proceeds of interstate commerce. It is on an essential component of the interstate flow. It is on what is so inseparable from and integrated in the interstate transaction that, without it, the interstate transaction would and could not be itself or even exist at all.

Moreover, it is the kind of levy which involves the hazard of duplication in every one of the many states where the appellant has similar plants (R. 52). It also involves the hazard of duplication in Virginia (the domiciliary situs); in New York (the business situs); and in every other state where the goods are (a) sold by an established agent, (b) shipped from a stock of goods, or (c) delivered for consumption. (See pp. 4, 5, *supra*.)

Furthermore, it is unapportioned either to these potentialities, or to the totality of the commerce, or to any contribution, however real or imaginary, which Ohio may make to such commerce. It is on the full face amount.

(3) In short, as applied to this appellant, this Ohio tax, viewed realistically and according to the economic facts of life, is:

(1) a direct tax on interstate commerce (*Freeman vs. Hewit*, 329 U. S. 249, 255);



(2) a tax which potentially can "lend itself to repeated exactions in other states" (*Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 87);

(3) a tax unapportioned by any yardstick or relationship whatever or to other exactions, actual or potential (*Adams Mfg. Co. vs. Storen*, 304 U. S. 307, 311); and

(4) a tax on the gross proceeds of interstate sales contracts, not on the net income of the taxpayer (*United States Glue Co. vs. Town of Oak Creek*, 247 U. S. 321, 328-9).

(5) a tax which exposes appellant to "the risk of a multiple burden to which local commerce is not exposed" (*Gwin, etc., Inc. v. Henneford*, 305 U. S. 434, 439).

## POINT II

Furthermore, and irrespective of the vice of being a direct tax on interstate commerce, the tax under appeal is on an intangible having no situs in Ohio.

Hence, its enforcement constitutes the taxing of property without "due process of law". Ohio has no jurisdiction over the receivables it has taxed.

### A

#### There is no domiciliary situs in Ohio

The appellant is a Virginia corporation. Hence the fact that it has a manufacturing plant at Carthage, Ohio, gives to the intangibles involved no "domiciliary situs" in Ohio.

In *Newark Fire Insurance Co. v. State Board*, 307 U. S. 313, decided May 29, 1939, New Jersey assessed a tax against a New Jersey corporation upon the full amount of its capital stock paid in and its accumulated surplus. The tax was resisted upon the ground that the business situs of its intangibles and the tax domicile of the corporation were in New York where all its business affairs were conducted and its executive offices maintained. This Court sustained the tax in two opinions, each concurred in by four Justices. The opinion written by Mr. Justice Reed, and concurred in by the Chief Justice and Justices Butler and Roberts, said (p. 318):

"In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty, the presumption is that such property is taxable by the state of the corporation's origin."

The opinion written by Mr. Justice Frankfurter and concurred in by Justices Stone, Black and Douglas, was to

the effect that the tax fell within the constitutional power of a state to tax a corporation of its own creation.

## B

### There is no business situs in Ohio

(1) Directly in point is *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, decided May 18, 1936.

There the facts were very similar. A Delaware manufacturing company conducted none of its business in that state but established its commercial domicile in West Virginia. In West Virginia it maintained its general business offices where its general accounts were kept, its stockholders and directors held their meetings, and its officers managed and controlled its operations, including what was done in its plants and sales offices in other states. All contracts of sale were subject to the approval of this main office and all invoices were payable there. It had bank deposits outside of West Virginia, resulting from deposits by its West Virginia office of commercial paper received from customers, which deposits were used in meeting payrolls and in paying for materials, equipment, and maintenance and operating expenses in the course of its manufacturing activities; but these local deposits were drawn upon only by the West Virginia office or under its direction.

West Virginia levied what this Court described (p. 204) as "an *ad valorem* property tax upon accounts receivable". The tax was challenged as violative of the Fourteenth Amendment (p. 204).

In approaching the issue this Court cleared the ground by first stating that (p. 208) "the tax is not a privilege or occupation tax. It is not a tax on net income". This Court then said (pp. 212-3):

"Here, the tax is a property tax on the accounts receivable, as separate items of property, and these

are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned, and used in production of material for sale.' This is to confuse two distinct subjects of *ad valorem* property taxation, the accounts receivable which arise from sales and the manufacturing plants. *The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale.*" (Italics ours.)

(2) In *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234, decided April 26, 1937, a Delaware corporation transacted its corporate and fiscal business in Minnesota. In that state it maintained a business office and held its meetings of stockholders and directors. It owned a controlling interest in the stock of a number of banks of several states. The stock certificates of the subsidiaries were kept in Minnesota; and there the corporation received the dividends thereon and declared and disbursed its own dividends. From its office in Minnesota it actively exercised, through this stock ownership, its power of control of its subsidiary banks.

This Court held that the corporation's "commercial domicile" was in Minnesota, and that its shares of stock in the banking corporations in other states were subject to a "property tax" by Minnesota. This Court conceded that the tax was "the taxation of intangibles" (p. 241), and said (p. 237):

"But it is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a 'commercial domicile' there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus become integral



parts of some local business.' *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 219; see *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 213; *Beidler v. South Carolina Tax Comm'n*, 282 U. S. 1, 8; *First National Bank v. Maine*, 284 U. S. 312, 331." And again (p. 238):

"Appellant's entire business in Minnesota is founded on its ownership of the shares of stock and their use as instruments of corporate control. They are as much '*integral parts*' of the local business as *accounts receivable* in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. Compare *Wheeling Steel Corp. v. Fox*, *supra*, 212-214. Thus identified with the business conducted by appellant in Minnesota, they are as subject to local property taxes as they would be if the owner were a private individual domiciled in the state." (Italics ours.)

(3) This concept of "a business situs" for an *ad valorem* tax on accounts receivable has always been associated with the concept of the *integration* of such receivables and of their avails with the locality of the general business and control by which the contracts embodying the receivables were made and into which the avails went. The location of such general business and control constituted the "business situs" of such receivables.

This concept of "*integration*" as an indicium of "business situs" is stated in 143 *A. L. R.* 367, 368, as follows:

"In a number of decisions, mostly of recent origin, the courts have used, as a test for the legal existence of a business situs of intangible property for the purposes of property taxation in a state other than the domicile of the owner, the concept of 'localization' of the intangibles and their 'integration' with local business in the state. Instead of holding one particular outstanding fact or circumstance as an indispensable condition of such a situs, it is necessary under the 'integration doctrine,' in order to authorize taxation, that the intangibles have become an integral part of

some business activity, and that their possession and control be localized in some independent business or investment away from the owner's domicile, so that their substantial use and value primarily attach to and become an asset of the outside business, or, in other words, that the local independent business controls and utilizes, in its own operation and maintenance, the intangible property and its income."

See also 51 *Am. Jur.*, Sections 469, 470, pages 480, 481, 482.

(4) In the present instance, the receivables involved and their avails are clearly "*integrated*" with the general interstate business conducted and the general interstate control exercised by the appellant at its executive offices in New York City.

That is the location of its executive management, its fiscal affairs, its bank deposits and its general fund. To that sovereign office all orders for appellant's goods must come for consideration and acceptance or rejection. There, by acceptance, the orders transform into contracts; and there, by these contracts, the terms of the indebtedness constituting the receivables are embodied and fixed. There the appellant's books of account which reflect these contracts and their terms are kept. There, also, the avails of the receivables—the payments in liquidation of them—are received and merged into the appellant's general fund there maintained.

Than this, no more complete "*integration*" can be conceived. The whole life process of the receivables from conception, through birth, life-span and ultimate extinction, takes place in and as part of the general interstate business of the appellant in New York.

## C

Hence, Ohio has no jurisdiction to levy an *ad valorem* property tax upon these accounts receivable.

As stated by Mr. Chief Justice White in *Looney v. Crane*, 245 U. S. 178, 188, no state can " \* \* \* exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the state, in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment."

In *Buck v. Beach*, 206 U. S. 392, this Court said (pp. 408-9):

"For the reason that, as the assessment in this case was made upon property which was never within the jurisdiction of the state of Indiana, the state had no power to tax it, and the enforcement of such a tax would be the taking of property without due process of law."

## D

Since the interstate contracts and the indebtedness contracted therein, and their avails, are all integrated with the appellant's business in New York, Ohio has no jurisdiction over them on the theory of benefit or protection.

Mr. Justice Frankfurter in his concurring opinion in *Tax Commission v. Aldrich*, 316 U. S. 174, said (p. 183):

"Of course, the Due Process Clause has its application to the taxing powers of the States—a State cannot tax a stranger for something that it has not given him. When a State gives nothing in return for exacting a tax it may be said that there is no 'jurisdiction to tax.'"

The accounts receivable involved in this case have never been in Ohio under any stretch of imagination or

legalistic legerdemain, and the same are beyond the jurisdiction of Ohio to tax.

The appellant's contracting and selling business and its receipt, handling and use of the avails therefrom were and are all conducted and localized in New York.

The receivables and their avails were an integral part of that business. The localization of the greater carried with it the localization of the less.

Ohio could not either forbid, restrict or tax the appellant's right to conduct its general business in and from its sovereign business office in New York. Ohio could not forbid, restrict or tax the interstate contracts by which the appellant conducted such business from New York. As interstate contracts they had no localization in Ohio. Ohio had no part in the making of them; furnished no protection to them; and gave and could give nothing in return for any tax, *ad valorem* or otherwise, which it might attempt to impose upon them.

Even in the case of one of its residents, a state is barred by the Fourteenth Amendment from laying an *ad valorem* tax on his tangible property permanently located outside its jurisdiction. (*Greenough vs. Tax Assessors*, 331 U. S. 486, 491; and cases there cited.)

## E

The fact that the appellant's executives in New York directed that shipment be made from the appellant's Ohio plant cannot give an Ohio situs to the antecedent contract and to the antecedent obligation of the orderer embodied therein.

(1) In *In re Harris Upham & Co.*, 194 Okla. 155, 148 Pac. (2d) 191, 194, 195, it was held (p. 159):

"1. In order to constitute a business situs where intangible property is taxable other than the owner's domicile, it must be shown that the possession and



control of the property has been localized in some independent business or investment away from the owner's domicile, so that its substantial use and value primarily attaches to and becomes an asset of the outside business.

"2. Appellee, a copartnership domiciled in New York, engaged in business as a commission broker for purchase and sale of securities, maintains an agency in Oklahoma City, which agency is authorized to take orders for purchase and sale of securities and forward the same to a branch office. Said local agency is without authority to approve accounts or extend credit to local customers, but credits are extended to said customers by appellee's branch office located at Kansas City, Missouri, and the same appear as debit balances charged against Oklahoma customers of the appellee upon the books of the Kansas City office. *Held*, that said debit balances do not have a business situs for the purpose of taxation within this state under the provisions of the Intangible Personal Property Tax Act, 68 O. S. 1941, Sections 1501-1520."

In *National Metal Edge Box Company v. Readsboro*, 94 Vermont 405, 111 Atl. 386, the office of the company in the state of Vermont had nothing to do with the sale of goods manufactured there nor with fixing the price for which the goods were sold. All the business of the plaintiff conducted in Vermont consisted of manufacturing paper bound boxes and pulp which were sent to Philadelphia. The products also were shipped elsewhere on orders from the Philadelphia office in which case the memorandum of shipment was sent to the home office. The court held (to quote the official headnote):

"1. Where a foreign corporation with its principal place of business and home office in another state attended to all business matters and kept and collected all accounts originating at its manufacturing plant and branch office in this State at its home office, its accounts receivable originating from the business in this State were not taxable here."

Section 5328-2 of the General Code of Ohio, is similar in purport to a Louisiana statute, though differing somewhat in language. The Louisiana statute whose text and interpretation will be found in *Bowman-Hicks Lumber Company, Inc. v. Cole*, 151 La. 303, 308-9, 91 So. 744, 746, provides:

"That the notes, judgments, accounts and credits of such non-resident persons, firms, corporations, partnerships, associations, or companies doing business in the State of Louisiana, originating from the business done in this State, be and the same is hereby declared to be property with its situs within the State, and subject to taxation at the business domicile in this State of the said non-resident person, firm, corporation, partnerships, association, or company, or their business agent or representative, under the same rules and in the same manner that property of a like nature is assessed and taxed within the State of Louisiana."

In the case just cited, the Supreme Court of Louisiana held that the accounts receivable of a foreign (Missouri) corporation could not be taxed in Louisiana merely because all shipments of goods originated in the Louisiana plants of the corporation, since the facts indicated that the business was actually done outside the state. In its opinion the court said at pages 309-310:

"The facts are that plaintiff's domicile is in Kansas City, Missouri, where it maintains its principal business office. Its managers superintend all of its business from the Kansas City office, where its books, in which are entered all of its accounts and credits, are also kept. The output of its lumber manufacturing plants, which are located in Louisiana, is sold upon orders which must be accepted in Kansas City, from which place deliveries are ordered to be made in various parts of the country, all shipments, however, originating from its plants in Louisiana. Deliveries are made all over the United States outside of this state, purchases by Louisiana customers are

sometimes made from the mill but such sales may only be made for cash and constituted, for the year 1920, not over 3 per cent. of the output of its plant. . . . 'Doing business,' in the sense in which it is applicable to plaintiff in this case, means selling the product which it manufactures in its lumber plants, and it appears, from the uncontested facts hereinbefore stated, that plaintiff's sales, from which taxable credits arise, are considered, made, and completed in Kansas City, at plaintiff's actual domicile, and that the only incident connected with these sales, which takes place in Louisiana, is shipment, which is made from plaintiff's mills. Under the language of the act, the credits do not arise from business done in this state, and they are therefore not taxable in this state."

The facts in this Louisiana case are practically identical with those involved herein.

(2) Ohio has already laid its tax on all the appellant's real and tangible personal property in Ohio, "including its products (whether in bulk or in cases)" (R. 52) and on the appellant's franchise to do business and manufacture in Ohio (p. 15, *supra*). .

To the making of the interstate contracts which express these accounts receivable, it has furnished no benefit or protection whatever,—certainly none "adequate to support a tax exaction" of the present character, and not fully recompensed by other tax exactions. (*Greenough vs. Tax Assessors*, 331 U. S. 486, 491.)

### POINT III

Furthermore, the tax under appeal, and the Ohio statute as construed and applied by the Ohio Supreme Court, are a violation of the Fourteenth Amendment in that they constitute a denial of "the equal protection of the laws".

Section 5328-2 of the General Code of Ohio, quoted from at page 8, *supra*, and quoted in full in the Appendix at page 48, *post*, defines, for the purpose of taxation, the "situs" of intangible personal property "when used in business".

As to the "situs" of "accounts receivable", it declares:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state."

Section 5328-2 also declares:

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed."



The effects of these provisions are:

(1) The "business situs" of an account receivable is determined for exemption or taxability by either of two alternatives, to-wit (a) the location of the stock source or (b) the location of the agency source.

Obviously, these alternatives work in favor of exemption for the Ohio resident and in favor of taxability for the non-resident. Exemption for the resident has two chances, whereas taxation of the non-resident follows from either:

An Ohio resident is *exempt* from taxation on a receivable "having a business situs outside of this state," in *either* of two contingencies, to wit: where such receivable was (a) one "resulting from the sale of property sold by an agent having an office in such other state, or (b) from a stock of goods maintained therein." On the other hand, *mutatis mutandis*, a non-resident is *taxed* in *either* of such two contingencies.

(2) Under these provisions, a resident of Ohio, in order to escape taxation on accounts receivable resulting from his sales, has merely to effect such sales either from a stock of goods maintained, or through an agent having an office, over the state line. On the other hand, a non-resident, if he sells either from a stock of goods maintained, or through an agent having an office, in Ohio, is taxable on the resulting receivables.

Thus, an Ohio resident, whether individual or corporate, may operate and control his business from his own residence or office in Ohio, and yet escape Ohio taxation on his receivables by the simple device of having them made through an agent or from a stock of goods conveniently located over the state line. On the other hand, a non-resident who ventures into Ohio with a stock of goods or an agency office automatically subjects his resulting accounts receivable to this Ohio tax.

Hence, an Ohio resident (individual or corporate) has two devices and two chances to *escape* taxation of intangible personal property in Ohio. On the other hand, when the factual situation is reversed, a non-resident (individual or corporate) is made *taxable* by either of these chances.

To illustrate: If a non-Ohio corporation owned an account receivable from a sale by an agent with an office in Indiana but filled from a stock of goods in Ohio, such account receivable would be taxable in Ohio. On the other hand, if an Ohio corporation owned an account receivable resulting from a sale by an agent with an office in Indiana but filled from a stock of goods in Ohio, such account receivable would not be taxable in Ohio. Thus, an identical sale from a stock of goods maintained in Ohio through an agent having an office in Indiana would be taxable in a case where the seller was a non-resident but would not be taxable where the seller was a resident.

Thus, an Ohio resident or an Ohio corporation can *escape* taxation by doing business through either of two methods, whereas the competitor, a non-resident or a non-Ohio corporation, is *caught* with taxation upon doing business through either of the same methods.

This very case shows the appellant as in the grasp of this discrimination.

(3) A taxing statute which effects such discriminations contravenes "the equal protection clause" of the Fourteenth Amendment. It creates a special tax immunity and favored treatment for domestic residents and corporations not enjoyed by the non-domestic.

Although Ohio could require a foreign corporation seeking to do business in Ohio, to pay "an admission fee" to secure equal privileges with citizens of Ohio, nevertheless, after that fee has been paid and admission has been lawfully secured, "the foreign corporation stands equal and

is to be classified with domestic corporations of the same kind" (*Hanover Fire Ins. Co. v. Harding*, 272 U. S. 494, 510-1). It cannot thereafter be discriminated against by subsequent legislation not part of the fee for admission (*Conn. General Co. v. Johnson*, 303 U. S. 77, 79, 80). As said in *Hillsborough Township v. Cromwell*, 326 U. S. 620, 623:

"The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment."

(4) The arbitrary discrimination which results from the interpretation and application of the Ohio statute under appeal has the additional vice of infecting the field of competition.

It loads the dice of taxation to the advantage of the Ohio business man. (*Concordia Ins. Co. vs. Illinois*, 292 U. S. 535, 549.)

In *Southern Railway Co. v. Greene*, 216 U. S. 400, this Court held (to quote the headnotes):

"Equal protection of the laws means subjection to equal laws applying alike to all in the same situation.

A corporation is a person within the meaning of the equal protection provision of the Fourteenth Amendment.

A corporation which comes into a State other than that in which it is created, pays taxes thereto and acquires property and carries on business therein, is within the jurisdiction of that State, and, under the Fourteenth Amendment, entitled to protection against any statute of that State that denies to it the equal protection of the laws.

Arbitrary selection cannot be justified by calling it classification in the absence of real distinction on a substantial basis; and a classification for taxation

that divides corporations doing exactly the same business with the same kind of property into foreign and domestic is arbitrary and a denial of equal protection of the laws."

## CONCLUSION

**The judgment appealed from should be reversed, and judgment should be rendered for the appellant.**

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**APPENDIX****General Code of Ohio****Section 5325-1.**

[Application of term "used in business"; definition of word "business".] Within the meaning of the term "used in business," occurring in this title, personal property shall be considered to be "used" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. "Business" includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.

**Section 5328**

[All taxable property to be entered on general tax list and duplicate.] All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, vessels and boats, and shares and

interests therein, defined in this title as "personal property," belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title.

### **Section 5328-1**

**Property to be entered on classified tax list and duplicate; exemption.** All moneys, credits, investments, deposits and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; but the good will, license or franchise (whether granted by governmental authority or otherwise) of a business shall not be considered to be property separate from the other property used in or growing out of such business. Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

### **Section 5328-2**

**Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid.** Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein; or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

In the case of prepaid items, when the right acquired thereby relates exclusively to the business to be transacted in such other state, or to property used in such business.

In the case of accounts payable, the proportion of the entire amount of accounts receivable, wherever arising, represented by those arising out of business transacted in such other state ascertained as herein provided shall be taken to represent the proportion of the entire amount of accounts payable arising out of the business transacted in such other state.

In the case of deposits (other than such as are used in business outside of such other state), when withdrawable in the course of such business by an officer or agent having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business wherever transacted, shall be considered located in the state wherein

the owner resides, if an individual, or wherein its actual principal executive office is situated, if a partnership or association, or under whose laws it is organized, if a corporation, by whomsoever they may be withdrawable.

In the case of moneys, when kept on hand at an office or place of business in such other state.

In the case of investments not held in trust, when made, created or acquired in the course of repeated transactions of the same kind, conducted from an office of the owner in such other state, and (1) representing obligations of persons residing in such other state or secured by property located therein, or (2) when an officer or agent of the owner at the owner's office in such other state, has authority, in the course of the owner's business, to receive or collect the income thereon or the principal, if any, or both when due, or to sell and dispose of the same.

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof.



**Section 5638**

**Tax levy on intangible property on classified tax list; rates.** Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to-wit:

Investments, five per centum of income yield or of income as provided by section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar.

The object of the taxes so levied are those declared in section 5639 of the General Code.



Supreme Court of the United States

October Term, 1948

No. 448

NATIONAL DISTILLERS' PRODUCTS  
CORPORATION, New York, New York

EMORY GLANTIER,  
Tax Commissioner of Ohio

REPLY BRIEF FOR APPELLANT

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# Supreme Court of the United States

October Term, 1948

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No. 448

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NATIONAL DISTILLERS PRODUCTS CORPORATION,  
New York, New York,

*Appellant,*

*vs.*

C. EMORY GLANDER, Tax Commissioner of Ohio,

*Appellee.*

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## REPLY BRIEF FOR APPELLANT

This reply brief is directed to certain statements and arguments set forth in the brief of appellee which tend to confuse the issues presented by this appeal.

### The Decisions of the Supreme Court of Ohio

At page 38 of his brief appellee states that "The present system of taxation in Ohio became effective for the taxable year 1932 and there have been no substantial changes since then." Beginning with page 15 it cites and discusses several decisions of the Supreme Court of the State of Ohio in an effort to show that there has been a long and consistent record of administrative and judicial construction of Sections 5328-1 and 5328-2 of the General Code of Ohio.

It is true that the statutes in question became effective for the taxable year 1932 and that there have been no substantial changes by legislative enactment.

Nevertheless, the decision of the Ohio Supreme Court in 1944 in *Ransom & Randolph Co. v. Evatt*, 142 O. S. 398, made a radical change in the interpretation and application of the statutes with respect to the taxation of accounts receivable for *ad valorem* property tax purposes. This change was just as effective as if it had been made by the legislature. The Court there held that the receivables of an Ohio corporation were *exempt* from taxation in Ohio if they resulted either from the sale of property by an agent having an office in another state or from the sale of property from a stock of goods maintained in another state, regardless of whether the avails of the receivables were used in the Ohio business or in the business generally.

Prior to this decision in the *Ransom & Randolph* case, the Ohio Board of Tax Appeals had consistently held that "before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicile of the taxpayer, it must appear that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other states, but were therein so used as to become an integral part of the business carried on in such other state; and that it was not sufficient that such accounts receivable and other intangible property be used in the business generally by the taxpayer" (R. 17):

The above interpretation of the statute by the Board of Tax Appeals prevailed until 1944, when the Supreme Court of Ohio decided the *Ransom & Randolph* case (R. 17). Prior to that date the State of Ohio had made no claim that appellant's accounts receivable were subject to this tax.

The effect of the *Ransom & Randolph* case was to dispense with the ordinary common law rules for the determination of business situs and to substitute an arbitrary rule allegedly created by statute.

The Supreme Court of Ohio reaffirmed its position with respect to the taxation of accounts receivable owned by a resident, in *Haverfield Co. v. Eratt* (1944), 143 O. S. 58; but until the decision in the instant case on August 4, 1948, it had not applied the changed rule to the accounts receivable owned by a non-resident of Ohio. In fact, the instant case and the companion cases of *Wheeling Steel Corporation* and *United States Gypsum Company* are the only cases involving the situs of accounts receivable of non-residents which have been decided by the Ohio Supreme Court since 1932. They were decided in August, 1948 (R. 28).

From the foregoing it would appear that, contrary to the statement made by appellee in his brief, there have been radical and recent changes since 1932 in the Ohio system of taxing intangibles.

The State of Ohio now asserts the right to impose an *ad valorem* property tax on accounts receivable owned by a non-resident of the State, irrespective of where the avails were used, and whether or not such receivables were terms of interstate contracts not made in Ohio, provided the goods forwarded by the seller were from a stock in Ohio.

### **The Commerce Clause**

An *ad valorem* property tax has been imposed upon all of appellant's accounts receivable arising out of orders filled by shipment from appellant's plant in Ohio. The goods were shipped to customers throughout the United States (R. 56). The fact that the record does not disclose what part of the receivables arose from sales to customers in Ohio and what part from sales to customers in



other states is not material. The fact is that the tax has been imposed upon all the accounts receivable, without apportionment between interstate and intrastate sales (R. 57).

The appellee states at pages 29-30 of his brief that there has been an apportionment of the receivables here involved and that appellant has consented to such apportionment. This statement is contrary to the stipulated facts, as the record (p. 57) shows that the appellee seeks to tax the receivables arising from all sales of appellant's products which were shipped from its plant and plant warehouses in Ohio both to customers in Ohio and to customers in other states.

The tax here imposed is in substance and practical effect a direct tax on the gross proceeds of receipts from interstate sales, and as such is an invalid direct tax on interstate commerce.

*Freeman v. Hewit*, 329 U. S. 249;

*Adams Mfg. Co. v. Storen*, 304 U. S. 307;

*Gwin, etc., Inc. v. Henneford*, 305 U. S. 434.

With respect to appellee's argument based upon the case of *International Harvester Corporation v. Evatt*, 329 U. S. 416, it would seem sufficient to point out that this case involved a franchise tax for the privilege of doing business in Ohio and in no way involved the right of the state to levy a direct personal property tax on intangibles as separate items of property.

The appellee's brief speaks in general terms of benefit and protection. Its language might apply to appellant's tangible property and franchise in Ohio, on all of which it pays the compensatory tax. But the language cannot apply to the intangibles here involved. Ohio can furnish to such transitory choses in action no service not equally available in every other state of the Union.

## Due Process Clause

(1) The appellee in his brief refers to the case of *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, and quotes extensively therefrom. Appellee states that the decision of this Court therein is entirely favorable to him. He further states that the case held that the receivables of Wheeling Steel Corporation "arising from its sales and shipments from its Ohio plant and warehouses were subject to Ohio tax" (pp. 36-38).

Appellee has plainly misconstrued the holding of this Court, since the validity of the Ohio assessment on the Wheeling Company's receivables was not an issue before the Court. On this point this Court said at page 215:

"Upon this record the question before us is with regard to the constitutional validity of the tax as assessed in West Virginia and not as to the amount or validity of any tax assessed elsewhere."

Again at page 214 this Court said of the deduction of the Ohio assessment: "No question as to its propriety is before us on this record."

Whatever right Ohio might have to tax receivables having an actual and lawful situs in Ohio, Ohio has no right to tax receivables not shown to have such situs.

(2) At various places throughout his brief the appellee refers to the existence in Ohio of manufacturing plants, warehouses and other property owned by appellant. The ownership of such property is immaterial. The sole issue here is the right to tax certain specific items of property, that is, certain accounts receivable. The determination of that issue in no way depends upon the amount of other property owned by appellant in Ohio and taxed in Ohio. As said by this Court in *Wheeling Steel Corporation v. Fox*, 298 U. S. 193 (p. 212):

"Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

"Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of ad valorem property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale."

### **Equal Protection Clause**

In his brief the appellee denies that the statute in question is, on its face, discriminatory, but concedes (p. 47) that it "is susceptible of an interpretation that perhaps could result in discrimination in that a domestic corporation would be favored over a foreign corporation."

That the statute is discriminatory on its face is apparent when it is considered that, if the appellant here were an Ohio corporation, the accounts receivable in question would be free from tax under the plain language of the statute. Therefore, the statute does discriminate against a foreign corporation because under identical facts, save for the place of corporate domicile, the accounts receivable of a domestic corporation are exempt from tax while those of a foreign corporation are subject to tax.

In his brief appellee states (p. 50) that the Ohio Supreme Court has not held an Ohio corporation exempt from tax on accounts receivable arising from orders accepted outside Ohio but filled from a stock of goods within

that state. It might well be added that by reason of the provisions of the Ohio statute the Ohio Court may never have occasion to consider such an issue. The statute clearly provides that, in the case of an Ohio corporation, accounts receivable arising from orders accepted without the state and filled by shipment from a stock of goods within the state are exempt from tax. It must be assumed that the Tax Commissioner will not disregard the plain language of the statute and attempt to impose a tax where he is clearly forbidden to do so. The discrimination of which appellant complains arises from the fact that the Tax Commissioner is required by the statute to impose a tax against a foreign corporation, but is prohibited under like circumstances from taxing a domestic corporation.

#### Comments on Certain Statements In Appellee's Brief

Page 2, paragraph 2. "Ad valorem intangible property tax on the amount of credits *in Ohio*." This language of course assumes the entire point in issue in the case.

Page 4, paragraph 1. Reference is made herein to "prepaid intangible items" and such items are mentioned throughout the brief of the appellee. Prepaid intangible items are in no way involved in this case. There is no tax assessed in so far as this case is concerned upon prepaid intangible items of the appellant; and no prepaid intangible items are allocated to Ohio either in the stipulation of facts or in the return, which is a part of the record. Therefore reference to prepaid intangible items is unjustified and misleading.

Page 4, paragraph (a). Reference is made to "products stored" (in appellant's distilling and rectifying plant and plant warehouses) "after they had been blended, rec-



tified and bottled, or from products already bottled and stored at said plant and warehouses in Ohio." The record is specific to the effect that only bulk whiskey is "stored"; and this is stored only for aging purposes (R. 56, 57, Stipulation, paragraph 11).

Page 5, paragraph (e). This paragraph is misleading in its entirety in that it leaves the inference that all of the monies deposited to bank accounts in Ohio were proceeds of the accounts receivable involved in this case. The record is specific to the effect that, "Payroll checks for plant employees, including those employed at the plant of the corporation located at Carthage, Hamilton County, Ohio, are paid with funds on deposit in banks in the locality in which the plants are located. The funds for the payroll checking account for each plant are obtained through checks prepared and signed in the offices of the corporation in New York City. \* \* \* The avails of the accounts receivable when deposited by the corporation in banks in New York City are commingled with other funds of the corporation on deposit in that city, and which commingled funds are used by the corporation in the operation of its business throughout the United States, including the State of Ohio." (R. 52, Stipulation, paragraph 3).

Page 5, paragraph (g). The decision of the Supreme Court of Ohio in this very case is its first decision dealing in any way with accounts receivable of a foreign corporation in Ohio. The "line of decisions of a number of years' standing," is a line of decisions with the exception of the case of *Ransom and Randolph v. Evatt*, 142 O. S. 398, wholly inapplicable to this case.

This unjustified attempt on the part of the counsel for appellee to create the impression that we are now attempting to upset a body of law in effect over a long period of time runs throughout his brief.

Page 5, paragraph (l). The proportions of shipments of goods within Ohio and without Ohio have no bearing

on the location or situs of the accounts receivable involved herein. The court below assessed all the said receivables. •

Page 8. "However, appellant's payrolls were made up and payroll checks were issued and drawn on appellant's bank accounts at each of appellant's respective plants and distributed to employees at the respective plants." Here, again, is a material omission of the fact that the balances maintained in Ohio all resulted from checks drawn on New York funds by officers in the New York office of the corporation (R. 52).

Pages 9, 10, 11. These pages are based in part upon an effort by appellee's counsel to argue from alleged "balance sheets" not in the record, and constitute an argument that, inasmuch as appellant owns a great deal of property in Ohio and ships a great deal of merchandise from its plant in Ohio, it should pay taxes on its accounts receivable, whether located in Ohio or not.

This argument of course has no validity as a situs argument and can easily be exposed as fallacious. All the property mentioned and all of the manufacturing described are subject to appropriate forms of taxation in Ohio in and of themselves and should not be regarded as having any bearing on the situs of separate intangible personal property not referable to Ohio.

Page 11, paragraph 1. "Orders were accepted by appellant for its products 'F. O. B. Shipping Points.' ". The stipulation is: "Prices are F. O. B. Shipping Points" (R. 54).

Page 11, paragraph 3. "Upon examination of appellant's records at the New York offices • • •" etc. The Commissioner in fact made no examination of appellant's records at the New York offices, and nowhere in the record does it appear that he did make such examination. Further, in this paragraph, there is another unjustified reference to prepaid items hereinabove discussed..

Page 11, paragraph 4. The stipulation specifically states that no sales were made of products out of inventory in Ohio (R. 57, Stipulation, paragraph 11).

Page 12, paragraph 2. There is no statement in the record that all of the accounts receivable were due within one year and no statement whatsoever with respect to notes. So far as the record shows, appellant owned no notes.

Page 21, discussion of the case of *National Cash Register Company v. Evatt*, 145 O. S. 597. The holding of this case is misstated in so far as it is said that "Accounts receivable resulting from a sale of property sold by an agent having an office in another state but filled from stocks of goods maintained in Ohio have a situs in Ohio for tax purposes." The holding of the court in fact was (quoting from the language of the court at page 605), " \* \* \* Accounts receivable resulting from sales made within Ohio and sales made outside of Ohio, where the product was delivered from a stock of goods maintained in Ohio (for convenience called shipment sales) and the avails thereof were used or intended to be used in the business, did have an Ohio situs for purposes of taxation." There the tax was a franchise tax.

Moreover, while the National Cash Register Company was a foreign corporation, nevertheless, the evidence in the case clearly showed a commercial domicile in Ohio since the manufacturing plant and executive and accounting officers were located in Dayton, Ohio. Thus the constitutional questions in the instant case were not present in the *National Cash Register* case.

Page 24, first paragraph. Erroneous statement as to "stock of goods maintained" in Ohio and "prepaid items." The reference to "prepaid items" recurs in paragraph (a) also on page 24.

Page 25, first paragraph. Here, again, is the argument attempting to ascribe an Ohio situs to the property of appellant because appellant owns other property in Ohio on which other taxes are paid.

Page 25, second paragraph. While the record does not disclose the proportions of goods delivered from the Ohio plant intrastate and interstate, it is stated that goods are shipped to points both within and without Ohio. The tax herein is on intangible personal property owned on tax listing date (January 1, 1944). Hence the proportions of all goods shipped intrastate as against those shipped interstate are not material to the issues.

Page 27, discussion of *Parke Davis & Company v. Atlanta*. Counsel fails to state the fact that the goods involved in sales in such case were shipped into the state and stored in warehouses in Atlanta from which sales and shipments were made.

Page 30, first two lines. Nothing appears in the record to the effect that appellant "consented" to an "apportionment" of the credits involved. The use of the word apportionment is misleading in this connection. Paragraph 12 of the stipulation (R. 57) is clear to the effect that it was stipulated only that 34.2191 per cent of all the accounts receivable for the calendar year 1943 arose from sales of products shipped from the Ohio plant and plant warehouses.

Page 31, discussion of *International Harvester Company v. Evatt*, 329 U. S. 416. This case is of course a franchise tax case and the only holding of the court was to the effect that the value of the privilege of doing business in Ohio could be measured by the value of all the products manufactured in Ohio irrespective of where the products were ultimately destined to be sold. Manufacturing of course is an intrastate activity and the franchise tax on the privilege of engaging in manufacturing was measured by the value of such privilege.

Page 35, second paragraph. Here again appears the conclusion that the tax is applied to the value of appellant's "credits in Ohio." Further in the same paragraph appears the statement that orders were filled from the stock of products maintained in appellant's Ohio manu-



facturing plant or warehouses. These statements are not supported by the record.

In the same paragraph appears argument to the effect that the sales were consummated by the appellant within Ohio after the acceptance of the contracts of sale outside Ohio. This is neither the fact nor the law. The contracts were made in New York, and did not specify any goods in Ohio.

Moreover, the tax herein is not upon the sale itself, but upon the property owned by the appellant which had no taxable situs in Ohio.

### CONCLUSION

**The judgment appealed from should be reversed, and judgment should be rendered for the appellant.**

Respectfully submitted,

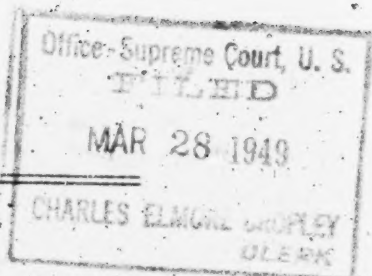
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No. 448.

Supreme Court of the United States

OCTOBER TERM, 1948

448

NATIONAL DISTILLERS PRODUCTS CORPORA-  
TION, NEW YORK, NEW YORK,

*Appellant,*

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO,

*Appellee.*

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# Supreme Court of the United States

OCTOBER TERM, 1948

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No. 448

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NATIONAL DISTILLERS PRODUCTS CORPORATION,  
NEW YORK, NEW YORK,

*Appellant,*

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF  
OHIO,

*Appellee.*

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## BRIEF OF APPELLEE

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### STATEMENT AS TO JURISDICTION AND THE DECISIONS BELOW

This appeal, under section 1257(2) of title 28, United States Code, is from a final judgment of the Supreme Court of Ohio affirming a decision of the Board of Tax Appeals in the Department of Taxation of Ohio.



This court has noted "probable jurisdiction" (R. 67).

By the determination affirmed, the Tax Commissioner of Ohio<sup>1</sup> assessed against appellant an ad valorem intangible property tax on the amount of credits in Ohio of the appellant, a Virginia corporation with its principal place of business and executive offices in New York City, New York, having a distilling or rectifying plant and plant warehouses at Carthage, Hamilton county, Ohio, and maintaining a checking account in a bank in Ohio in the locality at or near Carthage, Hamilton county, Ohio, and from which manufacturing plant or warehouses appellant's products were shipped to places both within and without the state of Ohio after orders for the sale of its products had been accepted by appellant at its New York offices. The credits so taxed were determined under and in accordance with sections 5327, 5325-1, 5328-1 and 5328-2, General Code of Ohio, as set forth in the Record at page 49. The tax so assessed was at the rate of three mills on the dollar of the value of said credits and was in the amount of \$8,990.01 and was for the year 1944 based upon the amount of such credits as of January 1, 1944.

The Supreme Court of Ohio has certified that it considered and adversely determined the appellant's contentions that sections 5325-1, 5328-1 and 5328-2, General Code of Ohio, as applied in this case, were contrary to the "commerce" clause in the United States Constitution and contrary to the "due process" and "equal protection" clauses in the Fourteenth Amendment (R. 8, 32-33).

The decision of the Supreme Court of Ohio is reported in 150 O. S. 229. The denial of the application for re-

1. C. Emory Glander, Tax Commissioner of Ohio, is the appellee and is referred to in this brief as the "Commissioner."

hearing is noted unofficially on page 340 of the October 11, 1948, issue of the Ohio Bar. The decision of the Board of Tax Appeals of Ohio is unofficially reported in 72 N. E. (2d) 592. The opinion of the Tax Commissioner of Ohio (R. 45-47) is not reported.

The facts have been stipulated (R. 51-58).

### **THE OHIO STATUTES INVOLVED**

The pertinent Ohio statutes are printed in full in the Appendix (pp. 53 to 62, post). Pertinent portions are quoted later in this brief.

### **QUESTIONS OF LAW INVOLVED**

1. Do sections 5325-1, 5328-1 and 5328-2, General Code of Ohio, as applied in the instant case, violate the "commerce" clause (section 8, article I) of the United States Constitution?
2. Do these sections, as so applied, violate the "due process" clause of the Fourteenth Amendment?
3. Do these sections, as so applied, violate the "equal protection" clause of the Fourteenth Amendment?

### **ASSIGNMENTS OF ERROR**

Appellant's assignments of error, presenting these three questions, are at pages 3 and 4 of the Record.

## STATEMENT OF THE CASE

### The Legal Issues

The question is, may the state of Ohio impose against appellant, a Virginia corporation authorized to do business within its borders, an ad valorem tax of three mills on the dollar in respect of the value of appellant's credits as of January 1, 1944, consisting of the sum of notes and accounts receivable due on demand or within one year from the date of inception thereof and prepaid intangible items over and above the sum of appellant's notes and accounts payable due on demand or within one year of the date of inception thereof, all pertaining to appellant's business in Ohio.

(a) when said receivables arose from the acceptance at its general business offices in New York City of orders for the sale of its products taken or received by appellant at its New York offices or at its various sales offices in so-called open states and such orders were sent to appellant's distilling or rectifying plant and plant warehouses in Ohio where they were filled from products stored there after they had been blended, rectified and bottled, or from products already bottled and stored at said plant and warehouses in Ohio,

(b) when such receivables were payable and paid at appellant's general business offices in New York City, and

(c) when so paid the avails thereof were used for the general purposes of appellant's business, including payment of the expenditures and expenses of appellant's said Ohio plant and warehouses, and

(d) when the general books and accounting records and the notes and other documents evidencing said re-

ceivables were at all times kept in New York City and were under the control of appellant's officers in that city, and

(e) when the only part of the proceeds of the collection of said receivables transferred to various bank accounts of appellant in Ohio was or were sums sufficient to make deposits to meet the payrolls of appellant's Ohio plant and warehouses upon which Ohio bank accounts were drawn and issued by and at such Ohio plant and warehouses checks to meet the payrolls of such plant and warehouses and to make payment of all federal excise taxes imposed upon products at appellant's plant and warehouses in Ohio, and

(f) when appellant had a large plant and government bonded warehouses for the storage and aging of its products, and large inventories in Ohio and a substantial part of its tangible personal property in Ohio, and

(g) when the Ohio Supreme Court has held that these intangibles have a taxable situs in Ohio under Ohio statutes and under a line of decisions, of a number of years' standing, interpreting and applying such Ohio statutes.

Appellee contends

(1) that the imposition and levy of the said ad valorem tax by Ohio on said intangibles, including receivables, is not void under the commerce clause as the intangibles have a business situs in Ohio and there is no evidence in the record as to what part thereof arose from the shipment of goods from Ohio to points outside of Ohio, and

(2) that Ohio has jurisdiction to tax these intangibles as they were used in business and arose out of business in Ohio and, having such situs in Ohio, the imposition of



the ad valorem tax at the rate of three mills on the dollar of value on such intangibles does not contravene the due process clause of the Fourteenth Amendment, and

(3) that the tax was imposed and assessed against appellant by the commissioner under Ohio statutes and, upon application and review, after hearing, the commissioner found such assessment valid and it was likewise so held by the Board of Tax Appeals of Ohio and by the Supreme Court of Ohio, and the Ohio statutes under which such levy and assessment were made have been interpreted in a number of decisions by the Supreme Court of Ohio over a period of years and the Supreme Court of Ohio in such decisions has been consistent and uniform in its interpretation of such statutes, and the application thereof as against appellant has not been capricious or arbitrary and appellant has not been singled out for assessment because it is a foreign corporation and the Ohio statutes have been applied uniformly to business ventures whether incorporated under the laws of the state of Ohio or elsewhere, and further that the intangibles had a business situs and a tax situs in Ohio, and such Ohio statutes as interpreted and applied do not violate the commerce clause of the constitution, or the due process clause or the equal protection clause of the Fourteenth Amendment.

## THE FACTS

The facts were stipulated by counsel for the parties and the stipulation of facts is printed in the Record at pages 51 to 58, both inclusive. The last paragraph thereof on pages 57 and 58 reads as follows:

"12. The corporation, for the tax year 1944, filed its annual report for personal property tax purposes, a true and correct copy whereof is included in the transcript of the proceedings before the appellee, that the corporation in its annual report to the state of Ohio did not allocate any of its accounts receivable to the state of Ohio; that thereafter the tax commissioner corrected said annual report by ascribing an Ohio situs to accounts receivable of \$2,996,670.00 in determining and assessing the intangible personal property tax of the corporation; that for the purpose of this appeal the corporation stipulates that 34.2191 percent of all of its accounts receivable for the calendar year 1943 arose from sales of its products which were shipped from its plant and plant warehouses in Ohio to customers throughout the United States; that said accounts receivable arose out of sales to its customers of its products manufactured in its plant in Ohio on orders solicited, received, accepted and filled as set forth in paragraphs 5, 6, 7, 8 and 9 herein; that a true and correct copy of the additional assessment certificate made and issued by the appellee is included in the transcript of the proceedings before the appellee subsequently denied the application of the appellant for review and correction of the determination and assessment made by the appellee and that the action of the appellee resulted in an additional intangible personal property tax in the sum of \$8,990.01 being assessed against the appellant; and that during the tax year 1944 the appellant did not pay in the state of Virginia nor in the state of New York personal property taxes on the accounts

receivable involved herein and assigned an Ohio situs by the appellee."

In essence, the facts are that at the times mentioned in the stipulation appellant was a Virginia corporation engaged in the business of manufacturing and distributing alcohol, whiskey and other alcoholic beverages (R. 52). Its general offices were located in New York City, where all of its officers had their offices, meetings of its board of directors were held, and its general books and its general accounting records were kept (R. 51). Custody and control of its money, notes, securities and other valuable effects were exercised by the corporation's officers in New York City, and all commercial and other accounts payable were paid by checks signed and issued at the New York City office (R. 51, 52); however, appellant's payrolls were made up and payroll checks were issued and drawn on appellant's bank accounts at each of appellant's respective plants and distributed to employees at the respective plants (R. 52). Checks were also drawn on such local banks and issued by appellant in payment of the federal excise taxes imposed upon appellant's products at its respective plants and warehouses (R. 52). Balances were maintained in banks situated in Ohio and elsewhere in the same localities as the plants sufficient for these purposes (R. 52). Appellant maintains or operates distilling or rectifying plants and plant warehouses in seven states including Ohio and in the latter state has one plant and warehouses located at Carthage in Hamilton county, Ohio (R. 52, 56, 57). Appellant had sales offices in numerous so-called open states but no sales office in Ohio as it is a so-called monopoly state (R. 54, 55). Appellant was qualified and licensed to do business as a foreign corporation in the state of New York (R. 51).

and also licensed to do business as a foreign corporation in the state of Ohio (Appellant's brief, pp. 5, 16).

Orders for its products were received by appellant at its New York City offices from the state of Ohio and certain other monopoly states and also were solicited and received at its sales offices subject to acceptance or rejection at the New York City offices and all orders received at the sales offices were forwarded to the New York City offices for that purpose (R. 54, 55). Credit was extended to purchasers and the terms thereof fixed only at the New York City office where all promissory notes and accounts receivable resulting from sales were payable and where the records of the accounts and the notes themselves were kept (R. 52). All accounts were billed from the New York City office and the sales offices had no powers or duties with respect to their collection. Proceeds of all receivables, when and as paid, were in the custody of appellant's officers at New York City and were there applied to the general purposes of the business, including its business in Ohio (R. 52). Appellant's conditions of sale listed among other conditions that prices were F.O.B. shipping points (R. 53, 54).

Appellant filed an inter-county or consolidated personal property tax return (R. 49-50C, 57) for 1944 with the Department of Taxation of Ohio and apparently listed in the return the machinery and equipment of its Ohio plant and warehouses, its stocks of finished and semi-finished products, and other tangible personal property situated in Ohio on January 1, 1944 (R. 49-50C, 56). The inter-county or consolidated personal property tax return for 1944 filed by appellant with the Department of Taxation of Ohio is not complete in the record, parts thereof, including a balance sheet or balance sheets of



the consolidated companies are missing, even though the stipulation of facts provides as follows:

"The corporation, for the tax year 1944, filed its annual report for personal property tax purposes, a true and correct copy whereof is included in the transcript of the proceedings before the appellee;

A consolidated return was filed by appellant for 1944 and the part of the return printed in the record at page 50A contains the following sentence:

"If a consolidated return is filed a consolidating balance sheet, including all controlled subsidiaries, is required."

The return shows that appellant had a subsidiary corporation, W. & A. Gilbey, Ltd., a Delaware corporation, whose address was 120 Broadway, New York 5, New York (R. 50). Apparently, certain items which were or should have been included in the appellant's balance sheet as of December 31, 1943, are set forth in the record at page 49. In view of the state of the record in respect to said consolidated personal property tax return for 1944, the commissioner urges that since appellant shipped during the calendar year 1943 from its plant and warehouses in Ohio \$56,819,430 worth of its products to customers in Ohio and outside of Ohio out of appellant's total shipments of \$166,044,832 of its products from all of its plants and warehouses throughout the United States wherever manufactured (R. 55, 56), and in view of the further facts that approximately \$2,757,540 out of a total of approximately \$8,060,836 of appellant's credits as of January 1, 1944, arose from shipments made by and from appellant's plant and warehouses in Ohio, and approximately \$239,130 out of a total of approximately \$322,051 of credits of W. & A. Gilbey, Ltd., a subsidiary

corporation of appellant, as of January 1, 1944, arose from shipments by said W. & A. Gilbey, Ltd., from stocks of goods maintained or manufactured by it in Ohio, appellant must have had a large manufacturing plant and large warehouses with large inventories therein as of January 1, 1944, and a very substantial part of appellant's investments in plants, warehouses and inventories must have been located in the state of Ohio on January 1, 1944, the tax day (R. 49).

Orders were accepted by appellant for its products "F.O.B. Shipping Points" (R. 53, 54), consequently appellant's receivables arose at the time of shipment and therefore at the place of shipment.

Upon examination of appellant's records at the New York offices, the commissioner ordered the assessment for taxation in Ohio for the year 1944 of \$2,996,670 out of a total of credits or net credits of \$8,328,887 appearing on appellant's books on January 1, 1944 (R. 49, 57). The applicable tax rate was three mills on each dollar of value and the tax was \$8,990.01 (R. 49, 57, 58). Appellant's receivables were included in said credits for the reason that they resulted from the sale of property from a stock of goods maintained within this state (Ohio) (R. 64), and the prepaid items were included in said credits for the reason that they represented prepaid items pertaining to appellant's business in Ohio.

Some of the receivables so assessed for property taxation in Ohio resulted from sales of products out of inventory in Ohio and delivered from Ohio; the greater part, however, resulted from sales of products manufactured in Ohio and delivered from Ohio after receipt of specific orders for them (R. 57). Some of the orders from which all of the receivables appellant eventuated were sent directly by the customers to the New York

City offices and were there accepted, but most of the orders were received at the various sales offices outside of the state of New York and were forwarded to New York City for acceptance (R. 54). After acceptance, the orders were then filled by the various plants and warehouses of appellant in Ohio and elsewhere (R. 55), but the receivables arising or resulting from the orders so filled from merchandise at or manufactured at appellant's plant in Ohio and shipped to customers from said Ohio plant were the only receivables taxed in Ohio (R. 57).

All of said notes and accounts receivable so taxed in Ohio arose in the ordinary course of appellant's business of making sales of its products on hand or manufactured and on hand in Ohio and all were due within one year (R. 56, 57).

No property taxes on all of its receivables were paid by appellant to the state of Virginia or the state of New York for the year 1944 (R. 58).

### **THE OHIO STATUTES FOR THE TAXATION OF CREDITS AND ACCOUNTS RECEIVABLE**

These statutes are printed in full in the appendix hereto (pp. 53 to 62, post). The relevant portions are as follows:

Section 5325-1, General Code of Ohio, is entitled: "Application of term 'used in business'; definition of word 'business'." The entire section reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained

as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be used when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code of Ohio, is entitled: "Property to be entered on classification tax list and duplicate; exemption." It provided in part as follows:

"\* \* \* Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons; and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. \* \* \*"

Section 5328-2, General Code of Ohio, is entitled: "Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid." It provides in part as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered



to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office, located in such other state.

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

Section 5320, General Code of Ohio, is entitled: "Meaning of word 'person.'" It provides:

"The word 'person' as used in this title, includes firms, companies, associations and corporations; words in the singular number include the plural number, and words in the plural number include the singular number; and words in the masculine gender include the feminine and neuter genders."

## THE DECISIONS OF THE SUPREME COURT OF OHIO

It is conceded that the tax imposed in the instant case is assessed against appellant but is an ad valorem tax. In the case of *The Procter & Gamble Company, Appellee, v. Evatt, Tax Commissioner, Appellant*, 142 O. S. 369, decided by the Supreme Court of Ohio on December 22, 1943, the court in the syllabus of the case<sup>2</sup> said:

"Where an Ohio corporation has district offices outside of Ohio, in charge of district managers who perform all administrative duties connected with such offices, supervise the selling and delivery of merchandise and collect therefor, deposit in banks in the respective districts funds arising from accounts receivable resulting from such sales, have authority to accept drafts on such bank accounts, and can and do apply such deposits on the expenses and needs of the district offices, such accounts receivable and the avails thereof are used in business in other states and arise out of business conducted in such other states, for and on behalf of the Ohio owner, and are exempt from taxation in Ohio under Sections 5328-1, 5328-2 and 5325-1, General Code, although checks covering the expenses of the district offices are forwarded to the company treasurer for his signature, and funds are withdrawn to Ohio after the expenses of the district offices have been satisfied."

The court in its opinion interpreted said section 5325-1, General Code of Ohio, said section 5328-1, General Code

2. The syllabus of a decision of the Supreme Court of Ohio is prepared by the judge assigned to write the opinion, and receives the assent of a majority of the court. It is the rule, therefore, that the syllabus states the law with reference to the facts upon which it is predicated. *The Baltimore & Ohio Railway Company v. Baillie, et al.*, 112 O.S. 567, 570.

of Ohio, and said section 5328-2; General Code of Ohio, and in its opinion in the last paragraph of page 371 and in the first two paragraphs of page 372 said the following:

"Each of the appellee's district offices outside of Ohio is in charge of a district manager who performs all administrative duties connected with the office. He supervises the selling and delivery of merchandise and makes collection therefor. He employs and discharges the employees connected with his office, and they are responsible to him.

"The district offices deposit the checks and money received in payment on their accounts receivable, in bank accounts in the district office cities. District managers have authority to accept drafts on the local bank accounts comprising such deposits, and apply these deposits in payment of the needs of their offices, including wages and salaries of employees, rent, warehouse and trucking charges, etc. All expenses of the district offices are paid by the district managers or under their direction. Checks covering such expenses are drawn on the local banks where the district offices are located, and are then forwarded to Cincinnati to be signed by the company treasurer. After being signed, the checks are sent to the payees.

"Deposits in the local banks are not withdrawn to Ohio until the expenses and needs of the district office are first satisfied."

In view of the facts that appellee was an Ohio corporation and that the ad valorem tax assessed by appellant against appellee on accounts receivable resulting from the sale of property (1) by an agent having an office in another state, (2) delivered from a stock of goods maintained in a warehouse in such other state, (3) arising from business conducted in such other state, and (4) the avails thereof which are used in business in such other

state, the facts meet all the tests in the exempting clauses of said sections, and the Ohio Supreme Court held that said accounts receivable were not taxable in Ohio, as under said sections such accounts receivable had a business situs outside of Ohio.

In the case of *The Ransom & Randolph Company, Appellant, v. Evatt, Tax Commissioner, Appellee*, 142 O. S. 398, decided by the Ohio Supreme Court on January 12, 1944, the court in the syllabus of the case said, among other things, the following:

"1. Under section 5328-1, General Code, intangible property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, is not subject to taxation in this state.

"2. Section 5328-2, General Code, fixes the business situs of accounts receivable. When such receivables are used in business and result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, such receivables shall be considered, for the purpose of taxation, to have arisen out of business transacted in a state other than that in which the owner thereof resides. The provisions of such section are to be reciprocally applied to the end that all accounts receivable having a business situs in this state shall be taxed in Ohio and no such property belonging to a resident of this state and having a business situs outside of this state shall be taxed in Ohio.

"3. Under section 5325-1, General Code, the term 'used in business' or 'used' when employed in statutes relating to taxation includes accounts receivable when they or the avails thereof are being applied, or are intended to be applied in the conduct of a business, whether in this state or elsewhere. The term 'business' includes all enterprises of whatever character conducted for gain, profit or income and extends to personal service occupations.



"5. The fact that a resident of Ohio withdraws the avails of accounts receivable, otherwise exempt from taxation, from banks in which out-of-state branches of his business have deposited them, and uses such avails in his business generally, including the payment of the expenses of such out-of-state branches, does not effect a change of the business situs of such accounts receivable for the purpose of taxation. Such accounts receivable are to be considered as having a business situs in the state where created, if they meet the test laid down in section 5328-2, General Code.

"6. The fact that deposits in other states are not withdrawable by an officer or agent having an office in such other state does not affect the business situs of accounts receivable arising from business done in such other states even though such deposits be the avails of such accounts receivable.

In the *Ransom* case, *supra*, appellant was an Ohio corporation with its office, manufacturing plant and principal place of business located at Toledo, Ohio, and had qualified to do business in the state of Indiana where it had two branch retail stores and also in the state of Michigan where it had four retail stores. The court in its opinion in the second paragraph on page 402 said:

"As found by the Board of Tax Appeals in its entry in the instant case: 'Inasmuch as the accounts and notes receivable here in question accrued to the company on the sale of its property by managing agents of the company having their several offices and places of business in certain designated cities in the states of Indiana and Michigan, and such property was sold from stocks of goods maintained by the company in its storerooms in the several cities of the other states herein referred to, it clearly appears that within the purview of sections 5328-1 and 5328-2, General Code, these receivables arose out of business transacted in states other than that in which the appellant as the owner of such receivables, resided.'"

In the *Ransom* case the commissioner had assessed the three-mill ad valorem tax on said accounts receivable resulting from such sales made by agents or employes having an office or store in another state and from a stock of goods maintained in such other state. The court held said accounts receivable are not taxable in Ohio as they had a business situs outside of Ohio. At page 408 in its opinion in the *Ransom* case, supra, the court said:

"\* \* \* The only statutory conditions for out-of-state situs accounts receivable are that they shall be used in business and shall result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein (Section 5328-2, General Code). \* \* \* However, we think that the accounts receivable in this case meet this test."

In the case of *The Haverfield Company, Appellant, v. Evatt, Tax Commissioner, Appellee*, 12 O. S. 58, decided by the Ohio Supreme Court on March 22, 1944, the court in its syllabus said, among other things, the following:

"1. Accounts receivable are 'used in business,' within the meaning of the statutes of Ohio relating to taxation, when they or the avails thereof are being applied or are intended to be applied in the conduct of a business, whether in this state or elsewhere.

"3. 'Accounts receivable' arising from business transacted in a state other than Ohio are 'used in business' within the provisions of section 5325-1, General Code, and therefore exempt from taxation in this state under the provisions of sections 5328-1 and 5328-2, General Code, where the avails of such 'accounts receivable' are used partly in payment of the expenses of the operation of such out-of-state business, and the balances, if any, remitted to and

used by the Ohio corporation in its regular course of business, whether in this state or elsewhere. (*Ransom & Randolph Co. v. Evatt*, Tax Commr., 142 Ohio St., 398, approved and followed.)

The Haverfield Company was an Ohio corporation with its principal place of business in Columbus, Ohio, engaged in selling millinery at retail, and conducted and operated retail millinery departments in department stores both inside of Ohio and outside of Ohio. The commissioner imposed the three-mill tax against the Haverfield Company on its accounts receivable resulting from the sale of property by agents having an office or retail space in a state outside of Ohio and from a stock of goods maintained in such state outside of Ohio. The court considered the above quoted sections and found that the accounts receivable were used in business and had a business situs outside of the state and consequently were not taxable in Ohio.

In the case of *C. F. Kettering, Inc., Appellant, v. Evatt, Tax Commissioner, Appellee*, 144 O. S. 419, decided by the Ohio Supreme Court on February 7, 1945, the court considered the above mentioned sections of the General Code of Ohio. The *Kettering* case, *supra*, involved an Ohio franchise tax assessment against a foreign (Delaware) corporation having its principal business office and place of business in Ohio and said corporation's business activities consisted principally of holding and owning shares of stock and other investments, including negotiable instruments, bonds, debentures and obligations, and real estate and collecting and receiving the income therefrom. The court in the second paragraph of the syllabus said the following:

"2. Under the provisions of sections 5498, 5328-1 and 5328-2, General Code, as they are connected and

related, a general bank deposit or account maintained in Ohio by a corporation organized under the laws of another state and used by it for the purposes of its business generally, within and without Ohio, may not be included in the base for the computation of the franchise tax to be collected from such foreign corporation, even though such deposit or account may fluctuate in amount and the funds therein are withdrawable by the Ohio officers or agents of the corporation."

In the cases of *National Cash Register Company, Appellant, v. Evatt, Tax Commissioner, Appellee*, 145 O. S. 597, decided by the Ohio Supreme Court on August 8, 1945, the court in the syllabus thereof said:

"1. In computing the franchise tax to be assessed against a corporation organized under the laws of another state but carrying on its principal activities in Ohio, accounts receivable, arising out of business transacted in this state on behalf of such corporation where the avails thereof are applied or intended to be applied in the conduct of its business either within or without this state, should be included in the base for the computation of such tax.

"2. Under the provisions of sections 5498, 5328-1 and 5328-2, General Code, general deposits of a foreign corporation, located in banks outside of Ohio, maintained and used by such corporation for purposes of its business generally, both within and without Ohio, should not be included in the base for the computation of the franchise tax to be assessed against such corporation, even though such deposits may fluctuate in amount and the funds therein are withdrawable by Ohio officers and agents of such corporation. (*C. F. Kettering, Inc., v. Evatt, Tax Commr.*, 144 Ohio St. 419, approved and followed.)"

The National Cash Register Company was a Maryland corporation with its manufacturing plant and executive and accounting offices located at Dayton, Ohio. The case



involves, among other things, sales made outside of Ohio by sales offices outside of Ohio, which sales were filled from stocks of goods located outside of Ohio. The court considered the above mentioned sections of the General Code of Ohio and for Ohio franchise tax purposes held in substance that (1) accounts receivable resulting from the sale of property sold by an agent having an office in a state other than Ohio and from a stock of goods maintained in such other state are considered to have a business situs outside of the state of Ohio, and (2) accounts receivable resulting from a sale of property sold by an agent having an office in another state but filled from stocks of goods maintained in Ohio have a situs in Ohio for tax purposes. The court at page 603 in its opinion said inter alia:

"Appellant lays great stress upon section 5328-2, General Code, and the reciprocal provision thereof.

"Sections 5328-1 and 5328-2, General Code, are *in pari materia* and must be construed together.

"Section 5328-1, General Code, insofar as applicable here, provides:

"\* \* \* Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person \* \* \* shall be subject to taxation \* \* \*

"It should be emphasized that that section provides for taxation property of a non-resident (foreign corporation). Accounts receivable used in and arising out of business transacted in Ohio on behalf of a foreign corporation are subject to taxation in this state."

In the case of *The American Rolling Mill Company, et al. Appellants, v. Evatt, Tax Commissioner, Appellee*, 147 O. S. 207, decided by the Ohio Supreme Court on De-

ember 11, 1946, the court considered said sections 5328-1 and 5328-2, General Code of Ohio, involving certain bank deposits of an Ohio corporation maintained in Missouri and Oklahoma, and held that they were subject to taxation under said sections 5328-1 and 5328-2, General Code of Ohio.

In the opinion handed down by Judge Turner in the *Ransom* case, supra, at page 409 appears the following paragraph:

"It is clear that it was the intention of the General Assembly that all property having a business situs in Ohio should be taxed in Ohio and that no property having a business situs outside of Ohio should be so taxed."

The decision of the Ohio Supreme Court in the case of *International Harvester Company v. Eratt, Tax Commissioner*, 146 O. S. 58, decided November 21, 1945, which decision was affirmed by this court as reported in 329 U. S. 416, is discussed later in this brief.

2

## ARGUMENT

Appellant's credits assessed for taxation in Ohio included the sum of all of appellant's notes and accounts receivable, due on demand or within one year from the date or dates of the inception thereof, resulting from sales and shipments from its plant and warehouses in Ohio to its customers of products produced at appellant's Ohio manufacturing plant and warehouses or of products from a stock of goods maintained by appellant at its said Ohio manufacturing plant and warehouses and the values of its prepaid items in so far as such prepaid items pertained to its Ohio manufacturing plant and warehouses over and above the sum of accounts payable due on demand or within one year from the date or dates of inception thereof. All of such accounts payable arose from appellant's business activities in Ohio and operations at its said Ohio manufacturing plant and warehouses. Said receivables or the avails thereof were used in appellant's business in Ohio and elsewhere. The assessments were made under various sections of the Ohio General Code, but the most pertinent of such sections are 5325-1, 5328-1, 5328-2 and 5638-1.

**(a) The Statutes in Question Are Constitutional Under the Commerce Clause.**

This is an Ohio ad valorem intangible property tax upon credits including accounts receivable resulting from the sale by appellant of its products manufactured, or stored, or manufactured and stored in Ohio and shipped to customers from Ohio and prepaid items (Ohio) less accounts payable (Ohio). It is an ad valorem tax on property having a situs in Ohio. It is not a tax upon gross receipts, income or the privilege of

doing business. It is difficult to see how when an ad valorem tax assessed against appellant, a foreign corporation licensed to transact business in Ohio and having a large part of its tangible personal property in Ohio, and when the tax at the rate of three mills per dollar of valuation is uniformly applied on all credits having a situs in Ohio, as of January first of each year, the commerce clause is offended.

The record does not disclose what part of appellant's products manufactured and delivered from its plants in Ohio was shipped outside of the state of Ohio. See *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250.

Further, it is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens, even though their just share of such burdens increases the cost of doing interstate business. See *Western Live Stock v. Bureau of Revenue*, supra.

In this court's opinion in *Western Live Stock v. Bureau of Revenue*, supra, at page 259, the court said:

"\* \* \* Recognizing that not every local law that affects commerce is a regulation of it in a constitutional sense, this court has held that local taxes may be laid on property used in the commerce; that its value for taxation may include the augmentation attributable to the commerce in which it is employed; and, finally, that the equivalent of that value may be computed by a measure related to gross receipts when a tax of the latter is substituted for a tax of the former. \* \* \*"

In its brief appellant relies upon a decision by this court in the case of *J. D. Adams Manufacturing Company v. Storen*, 304 U. S. 307, in which this court held that an Indiana gross receipts tax on 1% violated the commerce clause as it lays a tax on all gross receipts of



an Indiana corporation selling 80% of its products in interstate commerce and such tax is not apportioned by the statute imposing it. In its brief appellant also cites the case of *Gwin, White & Prince, Inc., v. Henneford*, 305 U. S. 434, in which this court held that a Washington state tax imposed for the privilege of engaging in business activities measured by gross receipts upon a domestic corporation whose only activities consisted of acting as the representative of growers in the state and marketing in other states fruits grown in the taxing state is unconstitutional and in violation of the commerce clause. It is difficult to see any similarity between the *J. D. Adams Manufacturing Company* case or the *Gwin, White & Prince, Inc.*, case and the instant case.

In *Memphis Natural Gas Company v. Stone*, 335 U. S. 80, this court held that a Mississippi franchise tax measured by the value of capital used, invested or employed within the state was not an unconstitutional burden on interstate commerce in the case of an interstate natural gas pipeline company, a portion of whose line passed through the state but which did no local business therein. In the opinion handed down by Mr. Justice Reed with the concurrence of Mr. Justice Murphy and Mr. Justice Douglas who were in the majority, it was said "that the burden imposed on interstate commerce was no more unreasonable than the concededly permissible ad valorem taxation of the company's property within the state."

Mr. Justice Frankfurter in his dissenting opinion, in which Chief Justice Vincent and Mr. Justice Burton concurred, said "that the pipeline company received from the state no protection, opportunities or benefits other than those for which it paid ad valorem taxes."

An ad valorem tax is not an unconstitutional burden on interstate commerce when it is levied against a foreign corporation on its receivables having a business situs within the levying state. See *Citizens National Bank v. Durr*, 257 U. S. 99; *Virginia v. Imperial Coal Sales Company*, 293 U. S. 15; *Parke, Davis and Co. v. Atlanta*, 200 Ga. 296; *Colgate-Palmolive-Peet Company v. Davis*, 196 Ga. 681.

In the case of *Parke, Davis and Co. v. Atlanta*, supra, the third branch of the syllabus reads as follows:

"If, under the facts of the case, a tax situs did exist in the municipality seeking to tax the accounts receivable, it would be immaterial whether they arose in interstate commerce, since the commerce clause (U. S. Const. art. I, sec. 8., cl. 3) does not exempt either tangible or intangible property from a non-discriminatory ad valorem tax by a municipality. Hence there would be no burden upon interstate commerce for the accounts receivable to be taxed as sought by the municipality, under the facts stated in the petition."

*Parke, Davis and Company* is a Michigan corporation engaged in a foreign commerce and commerce among the states manufacturing its goods in the state of Michigan and selling such goods abroad and to all the states of the United States. See *Parke, Davis and Co. v. Cook*, 198 Ga. 457.

In the case of *Colgate-Palmolive-Peet Company v. Davis*, supra, in its opinion at page 685 the court said:

"\* \* \* If under the facts of the case a tax situs did exist in Georgia (and we hold that it did) as to the credits sought to be taxed, it would be immaterial whether they arose in interstate commerce, since the commerce clause does not exempt either tangible or intangible property from a non-dis-

criminatory tax by a state. *Suttles v. Northwest-  
ern Mutual Life Insurance Co.*, supra (193 Ga. 495);  
*Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15.  
\* \* \*

Colgate-Palmolive-Peet Company is a Delaware corporation with its principal office at Jersey City, New Jersey, and the purchase orders, from which its said receivables arose, were sent from its sales office or offices in Georgia to its Jefferson, Indiana, office to be approved and filled.

In the case of *General Trading Company v. State Tax Commission*, 322 U. S. 835, this court, in its majority opinion handed down by Mr. Justice Frankfurter, at page 338 said:

"\* \* \* Of course, no state can tax the privilege of doing interstate business. See *Western Live Stock v. Bureau*, 303 US 250, 82 L ed 823, 58 S Ct 546, 115 ALR 944. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a state to the upkeep of which he may be asked to bear his fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best & Co. v. Maxwell*, 311 US 454, 85 L ed 275, 61 S Ct 334."

In the cases of *Oklahoma Tax Commission v. The Texas Company* and *Oklahoma Tax Commission v. Magnolia Petroleum Company*, Nos. 40 and 41 — October Term, 1948, decided on March 7, 1949, this court in its opinion rendered by Mr. Justice Rutledge on page 11 said:

"\* \* \* The theoretical burden which state *ad valorem* property taxation thus imposes upon the

Federal Government is regarded as too remote and indirect to justify tax immunity for property purchased from that Government. \* \* \*

In the case of *Freeman v. Hewitt*, 329 U. S. 249, cited and relied upon by appellant in its brief, this court held that a state gross income tax (Indiana Gross Income Tax of 1933) imposes an unconstitutional burden on interstate commerce when applied to the receipt by one domiciled in the state of the proceeds of the sale of securities sent out of the state to be sold. This court in its several opinions apparently either distinguished or approved of its decisions in *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33; and *Gwin, White & Prince v. Henneford*, *supra*.

In the case of *Joseph v. Carter & Weekes Stevedoring Company*, 330 U. S. 442, cited and relied upon by appellant in its brief, this court held that a state tax upon gross receipts of stevedoring companies from loading and unloading vessels employed in interstate or foreign commerce or upon the privilege of conducting such business measured by those gross receipts is precluded by the commerce clause.

These latter two cases and many other cases cited and relied upon by appellant in its brief involve gross income or gross receipts taxes or privilege of doing business taxes, unapportioned. Such decisions are not applicable to the instant case, as in the instant case the tax is an ad valorem imposed on credits owned by appellant on January 1, 1944. The credits have been determined pursuant to Section 5327, General Code of Ohio. The tax has not been applied to accounts receivable but to a sum from which accounts payable have been deducted, and



further there has been an apportionment of such credits consented to by appellant (R. 49, 57).

In the case of *Joseph v. Carter & Weekes Stevedoring Company*, *supra*, this court said in its majority opinion, handed down by Mr. Justice Reed, at page 427:

"\* \* \* This has arisen from long continued judicial interpretation that, without congressional action, the words themselves of the commerce clause forbids undue interferences by the states with interstate commerce and that this rule applies in full force to an unapportioned tax on the gross proceeds from interstate business, where the taxes were not in lieu of ad valorem taxes on property."

And again said at page 428:

"\* \* \* Nevertheless, a proper regard for the authority of the states and their right to require interstate commerce to contribute by taxes to the support of the state governments which make their interstate commerce possible, has led Congress, over a long period, to leave intact the judicial rulings, referred to above, that apportioned, non-discriminatory gross receipt taxes or those fairly levied in lieu of property taxes conformed to the requirements of the Commerce Clause. \* \* \*"

The tax applied in the instant case is a direct tax on property.

The appellant has quoted in his brief at pages 17 and 18 from the remarks of Honorable Aubrey A. Wendt, a former assistant attorney general of Ohio, in a paper read before the National Tax Administrators Association. Shortly after Mr. Wendt made his remarks, our Ohio Supreme Court by a unanimous decision handed down in five cases, of which the instant case is one, ignored Mr. Wendt's views, in their entirety, as expressed in his paper and did none of the things he thought they must do.

There is nothing hostile or discriminatory toward interstate commerce in the Ohio statutes involved in this case and the tax is not on interstate commerce but upon intangible property integrated in and with the large part of appellant's business conducted in Ohio and properties owned and operated by appellant in Ohio and having a business situs therein.

In the case of *International Harvester Company v. Evatt, Tax Commissioner*, 329 U. S. 416, this court upheld the constitutionality of Sections 5495 to 5499, both inclusive, General Code of Ohio, as interpreted and applied by the Ohio Supreme Court in the case of *International Harvester Company v. Evatt, Tax Commissioner*, 146 O. S. 58, decided by the latter court on November 21, 1945, sustaining Ohio franchise taxes for the years 1935 to 1940, both inclusive, imposed under said sections.

In the opinion in the latter case the Ohio Supreme Court said, at pages 69 and 70:

"10. The validity of an excise tax upon a foreign corporation depends upon its operating incidence. The application of Section 5498, General Code, and Tax Commissioner's Rule No. 275 in computing appellant's franchise tax for the year 1939 produced no unlawful result under the evidence in this case."

"Appellant in brief and argument attempts to treat the Ohio franchise tax as a sales tax, an income tax or a gross receipts tax, which it is not."

"It is the contention of appellant that no portion of the value of the products manufactured in Ohio which were sold in interstate commerce may be considered as a measure of the business done in Ohio. In other words, if all the products of a manufacturing plant in Ohio were sold in interstate commerce in the preceding year it would then follow that the corporation had done no business in Ohio in such factory."

"In substance appellant contends that because some of the raw materials used by appellant in its

Ohio manufacturing processes during a preceding year came into the state in interstate commerce and some of the finished products of the factories left the state in interstate commerce during a preceding year, the use of the sales value of the finished products of Ohio manufacture as an indication of the value of the business done in Ohio for the preceding year results in laying an unconstitutional burden on interstate commerce and in taxing property and business of the appellant outside Ohio in violation of the due process clause of the United States Constitution."

In the statement of said case said Rule 275 reading as follows is found on page 62:

"In the case of manufacturing companies, all sales of goods manufactured in Ohio, wherever sold, shall be considered as Ohio sales, except sales of such products as are sold from warehouses outside of this state."

Section 5498, General Code of Ohio, provides inter alia:

"In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of sections 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments."

International Harvester Company is a foreign corporation authorized to transact business in Ohio.

In its opinion in said case the Ohio Supreme Court said at page 72:

"Section 5498, General Code, provides the means for determining the value of the outstanding shares

of stock of a corporation (domestic or foreign) and prescribes the formula for determining the base upon which the fee provided for in Section 5499 of the General Code shall be computed, to wit: \* \* \*

This court in its majority opinion handed down by Mr. Justice Black said at page 419:

\* \* \* Appellant's claim is that the amount of the tax assessed against it has been determined in such manner that a part of it is for sales made outside Ohio and another part for interstate sales. These consequences result, appellant argues, from the formula used by Ohio in determining the amount and value of Ohio manufacturing and sales, as distinguished from interstate and out-of-state sales.

"The tax is computed under the Ohio statute in the following manner: Section 5498 prescribes the formula used in determining what part of a taxpayer's total capital stock represents business and property conducted and located in Ohio. \* \* \*"

And again at pages 419 and 420:

\* \* \* A part of the measure of the tax is consequently an amount equal to the sales price of Ohio-manufactured goods sold and delivered to customers in other states. Appellant contends that the state has thus taxed sales made outside of Ohio in violation of the due process clause. A complete answer to this due process contention is that Ohio did not tax these sales. Its statute imposed the franchise tax for the privilege of doing business in Ohio for profit: \* \* \*

And again at page 421:

"What we have said disposes of the only grounds urged to support the due process contention. It also answers most of the argument made against the Ohio statute on the ground that its application to appellant unduly burdens interstate commerce and therefore violates the commerce clause. Of course, the commerce clause does not bar a state from im-



posing a tax based on the value of the privilege to do an intrastate business merely because it also does an interstate business. *Ford Motor Co. v. Beauchamp*, 308 U. S. 331, 336, 60 S. Ct. 273, 276, 84 L. Ed. 304. Nor does the fact that a computation such as that under Ohio's law includes receipts from interstate sales affect the validity of a fair apportionment. \* \* \* And here, it clearly appears from the background of Ohio's tax legislation that the whole purpose of the state formula was to arrive, without undue complication, at a fair conclusion as to what was the value of the intrastate business for which its franchise was granted. \* \* \*

And at page 423 in a concurring opinion Mr. Justice Rutledge said:

"I concur in the opinion and judgment of the court. But I desire to add that, in the due process phase of the case, I find no basis for conclusion that any of the transactions included in the measure of the tax was so lacking in substantial fact connections with Ohio as to preclude the state's use of them. cf. *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304, dissenting opinion 322 U. S. at pages 352-357, 64 S. Ct. at pages 1032-1034, 88 L. Ed. 1319, if indeed a limitation of this sort were material to an apportionment found on the whole to be fairly made. For the rest, as the court holds, the apportionment clearly is valid."

The commissioner urges that, in view of the facts in the instant case and the decisions of this court, there is in this case no violation of the commerce clause.

**(b) Sections 5328-1 and 5328-2 of the General Code of Ohio, as Construed and Applied in This Case, Are Valid Under the Due Process Clause of the Fourteenth Amendment.**

These two sections are in pari materia and should be construed together. See *National Cash Register Company v. Evatt*, supra.

The tax is assessed against appellant and is an ad valorem property tax on the value of its credits in Ohio. The receivables included in the credits so assessed resulted from orders for sale and delivery of its products received at appellant's offices in New York City or at its various sales offices, and transmitted by such sales offices to New York City, where they were accepted by appellant; then such orders so accepted were transmitted to appellant's Ohio plant and warehouses for consummation of the contracts of sale and delivery of the products to the various persons placing the orders; and then such orders were filled from the stock of products maintained at appellant's Ohio manufacturing plant or warehouses or were manufactured and delivered from the stock of goods so manufactured in Ohio. The products were then shipped or delivered from its Ohio plants to appellant's customers and the sales completed. The contracts of sale were accepted by appellant outside of Ohio but the sales were consummated by appellant within Ohio. The records of the accounts receivable were kept at appellant's New York City offices and the receivables were payable there and when the funds were received they were used for general business purposes of the corporation, including the payment of the expenditures and the expense of appellant's Ohio manufacturing plant, warehouses and business. Appellant transferred suffi-

cient of such funds to its Ohio bank accounts maintained for purposes of meeting its payrolls at its Ohio manufacturing plant and warehouses and checks were drawn and delivered at its Ohio manufacturing plant for the payment of such payrolls. Appellant had a substantial part of its plants and inventories situated in Ohio; also it had a subsidiary corporation which transacted business in Ohio. The state of Ohio was one of its customers.

Appellant paid ad valorem taxes on real estate and its tangible personal property in Ohio. Appellant was authorized to transact business in Ohio and paid an annual franchise fee for so doing. Appellant was subject to taxation in Ohio. Appellant's said receivables had a business situs in Ohio and were subject to taxation in Ohio and its prepaid items pertaining to its Ohio plant and warehouses had a business situs in Ohio and were subject to taxation therein, both to the extent they were included in the credits taxed.

The appellant in its brief relies upon the decision of this court in the case of *Wheeling Steel Corporation v. Fox*, 298 U. S. 193. In that case this court in its opinion said the following relative to Ohio taxes on receivables of Wheeling Steel Corporation (pp. 207 and 208):

"The total amount of the corporation's accounts and notes receivable on January 1, 1933, was \$2,234,743.11. Of this amount, \$374,410.42 were receivables for goods sold and manufactured in, and shipped from, West Virginia to resident and non-resident purchasers. It appeared that the corporation had been assessed in Ohio, as of January 1, 1933, on accounts and notes receivable amounting to \$250,133.42.

"The Supreme Court of Appeals of West Virginia held that there had been 'such a localization of the corporation's business at Wheeling' that there was

imparted "to its entire intangible property a prima facie situs for taxation at that place." But the court thought that the 'statutory limitation of the assessment to property "liable to taxation"' indicated that the legislature 'did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction.' And referring to the above mentioned taxation in Ohio, the Supreme Court of Appeals said: 'For the purposes of this opinion, we assume that the claim of our sister state is well founded, and should be deducted from the assessment as corrected by the Tax Commissioner.' And in remanding the cause to the Circuit Court, the Supreme Court of Appeals gave opportunity to have it determined 'whether or not further deductions should be made in deference to the legal demands of other states.' In the further proceeding in the Circuit Court, it was stipulated that 'no states other than Ohio and West Virginia have assessed taxpayer upon any of its intangibles for the year 1933.'"

Then this court said the following at page 214:

"The state court permitted the deduction of the amount of the intangible property of the corporation which had been assessed in Ohio. That assessment, according to the agreed statement, was 'on accounts and notes receivable.' Counsel for the state, while insisting that the record does not show a taxable situs in Ohio of any of appellant's accounts receivable, has not taken a cross appeal or sought to assign error with respect to this part of the judgment of the Supreme Court of Appeals. The state is not in a position to complain of the deduction and no question as to its propriety is before us upon this record. Appellant argues that in Ohio 'only the excess of receivables and prepaid items over current payables' is actually taxed, and that the deduction of 'current indebtedness' accounts for the amount of the Ohio assessment. The inference is sought to be drawn that the amount of accounts receivables taken



into consideration in Ohio was thus larger than the amount assessed. We find no basis for a conclusion whether, or to what extent, deductions were allowed in Ohio."

The decision of this court in *Wheeling Steel Corporation v. Fox*, supra, is entirely favorable to the commissioner. It holds (1) that appellant's receivables and intangibles are subject to taxation in its chartering state, even though there is in neither case any evidence that the chartering state exercised its taxing power, and (2) that its receivables arising from its sales and shipments from its Ohio plant and warehouses were subject to the Ohio tax.

The present system of taxation in Ohio became effective for the taxable year 1932 and there have been no substantial changes since then.

In the case of *Citizens National Bank of Cincinnati v. Durr*, supra, this court held that membership in the New York Stock Exchange, when owned by a resident of Ohio, has a taxable situs in Ohio even though it may be subject to taxation in New York. In its opinion at page 108 the court said:

"That a membership held by a resident of the state of Ohio in the Exchange is a valuable property right, intangible in its nature, but of so substantial a character as to be a proper subject of property taxation, is too plain for discussion. That such a membership, although partaking of the nature of a personal privilege, and assignable only with qualifications, is property within the meaning of the Bankrupt Laws, has repeatedly been held by this court.

\* \* \* Whether it is subjected to taxation by the taxing laws of Ohio is a question of state law, answered in the affirmative by the court of last resort of that state, by whose decision upon this point we are controlled. \* \* \*

"The chief contention here is based upon the due process of law provision of the 14th amendment: it being insisted that the privilege of membership in the Exchange is so inseparably connected with specific real estate in New York that its taxable situs must be regarded as not within the jurisdiction of the state of Ohio. \* \* \*

And at page 109 this court said:

"Nor is the plaintiff's case stronger if we assume that the membership/privileges exercisable locally in New York enable that state to tax them even as against a resident of Ohio. \* \* \* Exemption from double taxation by one and the same state is not guaranteed by the 14th amendment. \* \* \* much less is taxation by two states upon identical or closely related property interests falling within the jurisdiction of both forbidden. \* \* \*

Appellant in its brief cites the case of *Newark Fire Insurance Company v. State Board of Tax Appeals*, 307 U. S. 313. In that case this court held that a tax levied by the state of New Jersey upon the paid-up capital stock and accumulated surplus of a New Jersey fire insurance company whose executive and general business offices at which its accounts are kept and its general affairs conducted are in New York and whose cash and securities are located there or in banks, only a small amount being deposited in New Jersey banks, was held not to violate the due process clause of the Fourteenth Amendment, even though the intangibles of the corporation had acquired a taxable situs outside of New Jersey. In a separate opinion announced by Mr. Justice Frankfurter, in which Mr. Justice Stone, Mr. Justice Black and Mr. Justice Douglas concurred, it is stated on page 324:

" \* \* \* it is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the constitution our task is ended."

The appellant in its brief cites the case of *Beidler v. South Carolina Tax Commission*, 282 U. S. 1. In that case this court held that the mere fact that a debtor is domiciled in South Carolina does not give said state jurisdiction to impose an inheritance or succession tax upon the transfer of the debt by a decedent who was domiciled in another state. The court in its opinion at page 8 said:

"It is sought to sustain the tax by South Carolina upon the ground that the indebtedness had what is called a 'business situs' in that state, and the state court adverted to this basis for the tax. In *Farmers Loan & T. Co. v. Minnesota*, 280 U. S. 204, 74 L. ed. 371, 65 A. L. R. 1000, 50 S. Ct. 98, *supra*, this court reserved the question of business situs, saying: '*New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 S. Ct. 110, *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 S. Ct. 585, *Liverpool & L. & G. Ins. v. Board of Assessors*, 221 U. S. 346, 55 L. ed. 762, L. R. A. 1915C, 903, 31 S. Ct. 550, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile.' But a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

The commissioner relies on the case of *Curry v. McCanless*, 307 U. S. 357, in which intangibles of a

trust created in Alabama and owning and holding such stocks and bonds in Alabama by a decedent domiciled in Tennessee was held to have two tax situs for inheritance tax purposes and this court specifically said (pp. 372 and 373):

"We can find nothing in the history of the Fourteenth Amendment and no support in reason, principle, or authority for saying that it prohibits either state, in the circumstances of this case, from laying the tax. On the contrary this court, in sustaining the tax at the place of domicile in a case like the present, has declared that both the decedent's domicile and that of the trustee are free to tax. \* \* \* That has remained the law of this court until the present moment, and we see no reason for discarding it now. We find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons: \* \* \*"

The commissioner also cites the case of *Wisconsin v. J. C. Penney Company*, 311 U. S. 435, in which this court held that a Wisconsin state tax on the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the state is not, as applied to a foreign corporation licensed to do business in that state, a violation of the due process clause. This court in its opinion at page 446 said:

"\* \* \* Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the state of Wisconsin has made possible, in so far as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes. \* \* \*"



In the case of *Parke, Davis and Co. v. Atlanta*, supra, it was said in the first and fourth branches of the syllabus:

"(1) Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the state, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to non-resident purchasers, accounts receivable thereon arise out of business conducted in the city of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by non-resident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the city of Atlanta and the state of Georgia."

"(4) Where a non-resident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits *would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the fourteenth amendment of the Constitution of the United States*, or paragraphs 2 and 3 of section 1 in article I of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the state." (Emphasis added.)

As stated in *Southern Pacific Company v. McColgan*, 68 Calif. App. (2d) 48 (1945), at page 70:

"\* \* \* In other words, when the *mobilia* rule was not in accord with the realities of the situation it was either disregarded or held not to preclude another state which had become definitely connected

with these intangibles from taxing them or their income. This concept that another state than the state of legal domicile had jurisdiction to tax intangibles was enunciated in a series of cases holding that where the intangibles had acquired a 'business situs' in a foreign state, that state could tax. (Citing cases.)"

And at page 71 it is stated:

"\* \* \* At any rate we do know, under the rule of the cases heretofore cited, that the fact that double taxation of the intangibles might result is not necessarily a constitutional bar to both states imposing a tax on the same intangibles."

See

*International Harvester Company v. Evatt*, Tax Commissioner, 329 U. S. 416 and 146 O. S. 58 (both supra).

The appellee, the commissioner, contends that the Ohio statutes as interpreted and applied are not in violation of the due process clause of the Fourteenth Amendment as:

(1) The tax imposed is assessed against a foreign corporation, licensed to do business in Ohio and subject to taxation in Ohio, and is an ad valorem tax on the value of credits.

(2) Credits include notes and accounts, due on demand or within one year from the date of inception thereof, and prepaid items, less notes and accounts payable due on demand or within one year after the inception thereof.

(3) The tax rate of three mills on the dollar of value of such credits is applied to credits having a situs in Ohio as defined by the Ohio statutes whether such credits belong to a non-resident or a resident.

(4) The proceeds of such tax, in the case of a corporation filing an inter-county consolidated personal property tax return, as appellant did for the year 1944, which is herein involved, went into the general revenue fund of the state of Ohio.

(5) Ohio conferred numerous benefits and protections upon appellant and its credits upon which the tax in dispute herein was assessed, in view of the facts that the receivables included in said credits arose from sales consummated at appellant's plant in Ohio, that a large part of appellant's manufacturing plants and warehouses were situated in Ohio, that a large part of appellant's inventories were maintained in Ohio, that appellant and its subsidiary had tangible personal property in Ohio, that appellant maintained bank accounts in Ohio, and that payroll checks were both drawn and delivered in Ohio, that appellant was authorized to and did transact business in Ohio, that appellant manufactured a large part of its products in Ohio and that it maintained large inventories of semi-finished and finished goods in Ohio as of tax listing day, January 1, 1944, and prior thereto, and that the state of Ohio was a customer of appellant.

(6) The credits arose from business and contracts consummated in Ohio.

(7) Orders were accepted by appellant for its products "F. O. B. Shipping Points" (R. 53, 54), consequently appellant's receivables arose at the time of shipment and therefore at the place of shipment and had a situs at the place of shipment (Ohio).

(8) Credits may have more than one situs for purpose of taxation. See *Curry v. McConeless*, supra; *Newark Fire Insurance Company v. State Board of Tax Appeals*, supra; *State Tax Commission v. Aldrich*, 316 U. S. 174;

*Cream of Wheat v. County of Grand Forks*, 253 U. S. 325; *Citizens National Bank of Cincinnati v. Durr*, supra; *Wheeling Steel Corporation v. Fox*, supra.

(9) The physical evidence of the credits or receivables does not have to be present in the state claiming to be the business situs of the credits or receivables on which the tax is imposed. See *Metropolitan Life Insurance Company v. New Orleans*, 205 U. S. 395; *Liverpool & L. & G. Insurance Company v. Orleans Assessors*, 221 U. S. 346; *Newark Fire Insurance Company v. State Board*, 307 U. S. 313; *Parke, Davis and Co. v. Atlanta*, supra; *Colgate-Palmolive-Peet Company v. Davis*, supra; *Southern Pacific Company v. McColgan*, supra.

(10) The credits taxed and the avails thereof were used in appellant's business in Ohio and elsewhere.

**(c) The Statutes in Question Are Not Invalid Under the Equal Protection Clause of the Fourteenth Amendment.**

The statutory provisions which, as construed and applied, imposed the tax here complained of, having been construed in a number of cases by the Supreme Court of Ohio. The pertinent statutes are Section 5325-1, General Code of Ohio, Section 5328-1, General Code of Ohio, and Section 5328-2, General Code of Ohio. The Ohio Supreme Court has construed and applied said statutes in cases where ad valorem taxes were assessed against corporations and franchise taxes were assessed against corporations. Such decisions are discussed earlier in this brief under the heading of "The Decisions of the Supreme Court of Ohio." The apparent purpose of said three sections is to make one of two factors sufficient for taxation of receivables when arising out of business



when such receivables or the avails thereof are used in business. We are here concerned with only the following (1) a sale of property by an agent or (2) a sale from a stock of goods, in testing the soundness of appellant's argument that said section so operates as to discriminate against it.

As applied to a domestic corporation either of the aforementioned factors is claimed by appellant to be sufficient to cause accounts receivable to arise out of business transacted in a foreign state. Hence, having a taxable situs in a state other than Ohio, such receivables would be exempt from taxation in this state. Applying the statute conversely and to a foreign corporation either of these two factors is sufficient to establish that receivables shall be considered as arising out of business transacted in this state. It is evident, therefore, that it was the legislative intent to treat domestic corporations and foreign corporations on an equal basis—either of two factors would be sufficient to make such receivables arise out of business transacted in a foreign state or arise out of business transacted in this state. It is felt, therefore, that *on its face* it can not be said that said section is discriminatory. A statute, for example, which specifically provided for a tax at one rate as to domestic corporations and for a tax at a higher rate as to foreign corporations would probably be one which *on its face*, and entirely independent of any operative facts, would be discriminatory. That is not the situation here.

A domestic corporation carrying on all of its business activities in this state and making sales from a stock of goods maintained herein, with receivables resulting therefrom, would clearly be subject to the provisions of Section 5328-2, General Code of Ohio, in that said re-

ceivables would arise out of business transacted in this state. Its receivables would have an Ohio situs under the sections of the General Code of Ohio here under consideration. Similarly, a foreign corporation whose receivables resulted from a sale from a stock of goods maintained in this state would also be subject to having said receivables considered as arising out of business transacted in this state. The section would operate with equal force against either corporation. It could hardly be said that under such circumstances there would be any discrimination.

"It will have to be recognized that there is some force to the argument that Section 5328-2, General Code of Ohio, is susceptible of an interpretation that perhaps could result in discrimination in that a domestic corporation would be favored over a foreign corporation. Appellant's argument in support of such claim appears at pages 42 and 43 of its brief, to wit:

"The effects of these provisions are:

"(1) The 'business situs' of an account receivable is determined for exemption or taxability by either of two alternatives, to-wit (a) the location of the stock source or (b) the location of the agency source.

"Obviously, these alternatives work in favor of exemption for the Ohio resident and in favor of taxability for the non-resident. Exemption for the resident has two chances, whereas taxation of the non-resident follows from either.

"An Ohio resident is *exempt* from taxation on a receivable 'having a business situs outside of this state,' in *either* of two contingencies, to wit: where such receivable was (a) one 'resulting from the sale of property sold by an agent having an office in such other state, or (b) from a stock of goods maintained therein.' On the other hand, *mutatis mutandis*, a non-resident is *taxed* in *either* of such two contingencies.

"(2) Under these provisions, a resident of Ohio, in order to escape taxation on accounts receivable resulting from his sales, has merely to effect such sales either from a stock of goods maintained, or through an agent having an office, over the state line. On the other hand, a non-resident, if he sells either from a stock of goods maintained, or through an agent having an office, in Ohio, is taxable on the resulting receivables."

"Thus, an Ohio resident, whether individual or corporate, may operate and control his business from his own residence or office in Ohio, and yet escape Ohio taxation on his receivables by the simple device of having them made through an agent or from a stock of goods conveniently located over the state line. On the other hand, a non-resident who ventures into Ohio with a stock of goods or an agency office automatically subjects his resulting accounts receivable to this Ohio tax."

"Hence, an Ohio resident (individual or corporate) has two devices and two chances to *escape* taxation of intangible personal property in Ohio. On the other hand, when the factual situation is reversed, a non-resident (individual or corporate) is made *taxable* by either of these chances."

However, if receivables are not taxed by a state, they are presumably taxable by another state where there is a situs.

This court in *Wheeling Steel Corporation v. Fox*, supra, approved of the decision of the Supreme Court of West Virginia in the case of *In re Wheeling Steel Corporation Assessment*, 115 W. Va. 553 (1934), wherein it was said at page 557:

"On the other hand, the federal court cautions against an assessment 'intrinsically arbitrary' of a unitary corporation enterprise which is conducted in several states, and warns that an apportionment of its intangible property among such states for purposes of taxation may be requisite. See Hans

Rees' Sons Inc. vs. North Carolina, 283 U. S. 123, 75 L. Ed. 879. The statutory limitation of the assessment to property 'liable to taxation' indicates that the legislature had this contingency in mind and did not propose to tax intangibles which were primarily subject to taxation in another jurisdiction."

In the case of *The Ransom & Randolph Company, Appellant, v. Evatt, Tax Commissioner, Appellee*, supra, the court in its opinion handed down by Judge Turner, at page 409, said the following in respect to said statutes:

"It is clear that it was the intention of the General Assembly that all property having a business situs in Ohio should be taxed in Ohio and that no property having a business situs outside of Ohio should be so taxed."

The Ohio statutes are intended (1) not to tax accounts receivable, used in and arising out of business, whether of a foreign or domestic corporation, having a situs outside of Ohio; (2) to tax accounts receivable of a domestic corporation unless such receivables have a situs outside of Ohio; and (3) to tax accounts receivable of a foreign corporation if they have a situs within Ohio. All receivables having a situs outside of Ohio are presumably subject to tax in another state.

The Ohio Supreme Court has construed and applied the pertinent Ohio statutes in cases in which the orders were accepted outside of Ohio by an Ohio corporation and delivery was made from a stock of goods maintained by said Ohio corporation at the place outside of Ohio where such orders were accepted and in such cases has held that the situs of the receivables arising from such sales is outside of Ohio and not subject to the Ohio ad valorem tax. See *Ransom & Randolph v. Evatt*, supra; and *The Haverfield Company v. Evatt*, supra.



However, the Ohio Supreme Court has not construed and applied such statutes in any case involving said ad valorem tax upon receivables arising where an Ohio corporation accepted outside Ohio an order for sale and filled such order from a stock of goods maintained within Ohio. Appellant complains that the Ohio statutes have been so construed and applied and that the construction which it assumes to have been made and to have exempted such receivables from the Ohio ad valorem tax is discriminatory as against appellant, a foreign corporation, because appellant has been held subject to such tax on its receivables arising from orders accepted outside Ohio by it when such orders were filled by it in Ohio from goods on hand in Ohio.

It is difficult to see how there has been any discrimination by the Ohio Supreme Court in construing and applying such statutes.

In the case of *Fidelity & Columbia Trust Company v. City of Louisville*, 245 U. S. 54; this court in its opinion handed down by Mr. Justice Holmes at pages 59 and 60 said:

“\* \* \* It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 146, 162, et seq., 55 L. ed. 389, 411, 417, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. Whichever this tax technically may be, the authorities show that it must be sustained.

“It is said that the plaintiff in error has been denied the equal protection of the laws because, if the argument is correct, which we have not considered, the decision in this case is inconsistent with earlier decisions of the Kentucky court. But with the consistency or inconsistency of the Kentucky cases we have nothing to do. *Lombard v. West Chi-*

cago Park, 181 U. S. 33, 44, 45, 45 L. ed. 731, 738, 21 Sup. Ct. Rep. 507. We presume that, like other appellate courts, the Kentucky court of appeals is free to depart from precedents if, on further reflection, it thinks them wrong."

In the case of *Citizens National Bank v. Durr*, supra, this court in its majority opinion at pages 109 and 110 said:

"That plaintiff is denied the equal protection of the laws, within the meaning of the 14th Amendment, cannot be successfully maintained upon the record before us. The argument is that other brokers in the same city are not taxed upon the value of their memberships in the local stock exchange, nor upon the privilege of doing business in New York Stock Exchange securities. As to the local exchange memberships, it may be that the failure to tax them is but accidental or due to some negligence of subordinate officers, and is not properly to be regarded as the act of the state. If it be state action, there is a presumption that some fair reason exists to support the exemption, not applicable to a membership in the New York Exchange, and plaintiff has shown nothing to overcome the presumption. As to the privilege referred to, it already has been shown that the rights incident to plaintiff's property interest give him pecuniary advantages over others in the same business. Manifestly this furnishes a reasonable ground for taxing him upon the property right, although others enjoying lesser privileges because of not having it may remain untaxed."

See

*International Harvester Company v. Evatt, Tax Commissioner*, 329 U. S. 416 and 146 O. S. 58 (both supra).

**CONCLUSION.**

From the foregoing, it is apparent that the Ohio statutes, as construed and applied, do not offend or violate the commerce clause of the Federal Constitution and do not offend or violate the due process clause or the equal protection clause of the Fourteenth Amendment to the Federal Constitution. It follows that the state of Ohio having the power to tax the credits in question, the assessment should be sustained.

Respectfully submitted,

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## APPENDIX.

### Ohio Statutes.

Section 5325-1. *Application of term "used in business"; definition of word "business."* Within the meaning of the term "used in business," occurring in this title, personal property shall be considered to be "used" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state, if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be "used" when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. "Business" includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations.

Section 5328. *All taxable property to be entered on general tax list and duplicate.* All real property in this state shall be subject to taxation, except only such as may be expressly exempted therefrom. All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof. All ships, ves-



sels and boats, and shares and interests therein defined in this title as "personal property," belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, shall be subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property as prescribed in this title.

Section 5328-1. *Property to be entered on classification tax list and duplicate; exemption.* All moneys, credits, investments, deposits, and other intangible property of persons residing in this state shall be subject to taxation, excepting as provided in this section or as otherwise provided or exempted in this title; but the good will of a business shall not be considered to be property separate from the other property used in or growing out of such business. Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, and non-withdrawable shares of stock of financial institutions located outside of this state, belonging to persons residing in this state, shall not be subject to taxation. Such property, subject to taxation, shall be entered on the classified tax list and duplicate of taxable property or on the intangible property tax list in the office of the auditor of

state and duplicate thereof in the office of the treasurer of state, as prescribed in this title.

A corporation shall not be required to list any of its investments in the stocks of any other corporation or in its own treasury stock.

Section 5328-2. *Fixing situs of certain classes of property within or without this state; application to be reciprocal; effect of provisions held invalid.* Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

In the case of prepaid items, when the right acquired thereby relates exclusively to the business to be transacted in such other state, or to property used in such business.

In the case of accounts payable, the proportion of the entire amount of accounts receivable, wherever arising, represented by those arising out of business transacted in such other state ascertained as herein provided shall be taken to represent the proportion of the entire amount of accounts payable arising out of the business transacted in such other state.

In the case of deposits (other than such as are used in business outside of such other state), when withdrawable in the course of such business by an officer or agent

having an office in such other state; but deposits representing general reserves or balances of the owner thereof, maintained for the purpose of his entire business wherever transacted, shall be considered located in the state wherein the owner resides, if an individual, or wherein its actual principal executive office is situated, if a partnership or association, or under whose laws it is organized, if a corporation, by whomsoever they may be withdrawable.

In the case of moneys, when kept on hand at an office or place of business in such other state.

In the case of investments not held in trust, when made, created or acquired in the course of repeated transactions of the same kind, conducted from an office of the owner in such other state, and (1) representing obligations of persons residing in such other state or secured by property located therein, or (2) when an officer or agent of the owner at the owner's office in such other state, has authority in the course of the owner's business, to receive or collect the income thereon or the principal, if any, or both when due, or to sell and dispose of the same.

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this

state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof.

Section 5638. *Tax levy on intangible property on classified tax list; rates.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to wit:

Investments, five per centum of income yield or of income as provided by section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar. The object of the taxes so levied are those declared in section 5639 of the General Code.

Section 5638-1. *Tax levy on property on intangible property tax list; rates.* Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of treasurer of state at the following rates, to wit:

Investments, five per centum of income yield or of income as provided by section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles,



five mills on the dollar; and moneys, credits and all other taxable intangibles, so listed, three mills on the dollar.

The object of such taxes levied on such property so listed are those declared in section 5414-19 of the General Code.

Section 5414-19. *Taxes collected for use of general revenue fund.* The taxes levied by section 5414-9 and section 5638-1 of the General Code and collected under the provisions of this chapter shall be for the use of the general revenue fund of the state and shall be paid into the state treasury.

Section 5327. *"Credits", "current accounts" and "prepaid items" defined; what not included.* The term "credits" as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. "Current accounts" includes items receivable or payable on demand or within one year from the date of inception, however evidenced. "Prepaid items" does not include tangible property. In making up the sum of such current accounts payable there shall not be taken into account an acknowledgment of indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor an acknowledgment for the purpose of diminishing the amount of credits to be listed for taxation.

Section 5625-3. *Authorized to levy taxes.* The taxing authority of each subdivision is hereby authorized to levy taxes annually, subject to the limitation and re-

strictions of this act, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations and restrictions of this act, levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes and certificates of indebtedness of such subdivision and taxing unit including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness. All taxes levied on property shall be extended on the tax duplicate by the county auditor of the county in which the property is located, and shall be collected by the county treasurer of such county in the same manner and under the same laws, rules and regulations as are prescribed for the assessment and collection of county taxes. The proceeds of any tax levied by or for any subdivision when received by the fiscal officer thereof shall be deposited in its treasury to the credit of the appropriate fund.

Section 5379. *Corporation may make consolidated return; property, how listed and assessed; inter-company accounts eliminated; joint return.* A corporation which owns or controls at least fifty-one per centum of the common stock of another corporation or corporations may, under uniform regulations to be prescribed by the commission, make a consolidated return or returns for the purpose of this chapter. In such case all the taxable property mentioned in section 5328 of the General Code, belonging to the corporation making the return and to each of its subsidiaries shall be listed and assessed in the name of the separate owners thereof, respectively; but the parent corporation making such return, shall

not be required to list any of its investments in the stocks, securities and other obligations of its subsidiaries, and in computing the amount of taxable credits, inter-company accounts shall be eliminated.

A husband and wife living together may under uniform regulations to be prescribed by the commission make a joint return for the purpose of this chapter. In such case investments of either spouse in the obligations of the other shall not be required to be listed therein, and in computing the amount of taxable credits such obligations shall be eliminated.

**Sections 5495 and 5498, General Code of Ohio, Relative to Ohio Franchise Taxes, Are Set Forth Below:**

*Section 5495. Fee charged against domestic corporations and foreign corporations.* The tax provided by this act for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state, except as provided herein, for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by this act for foreign corporations shall be the fee charged against each corporation organized for profit under the laws of any state or country other than Ohio, except, as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable.

*Section 5498. Determining the value of the outstanding shares of stock and intangible property; certification to auditor of state.* After the filing of the annual

corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of this act, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company, (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only) and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in section 5499 of the General Code shall be computed. Divide into two equal parts the value as above deter-



mined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

In determining the amount or value of intangible property, including capital investments, owned or used in this state by either a domestic or foreign corporation the commission shall be guided by the provisions of section 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation.